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Supreme Court of the United States

October Term, 1978

No. .....

78-1465

SAHARA-TAHOE CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, and HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Writ 8

I.

Employee Freedom of Choice and Majority Rule in the Selection of a Collective Bargaining Representative Are Paramount Principles in Our National Labor Policy Which Are Best Protected and Promoted by Means of the Electoral Process 8

II.

A Presumption That a Union Enjoys the Support of a Majority of the Employees in a Particular Bargaining Unit Should Not Be Utilized When It Results in a Denial of Employees' Protected Rights Under Section 7 of the National Labor Relations Act 12

III.

The Standard Governing an Employer's Rebuttal of the Presumption of a Union's Continued Majority Status Must Provide an Employer With a Meaningful Opportunity to Meet Its "Burden of Proof" 20

Page

A. The Ninth Circuit's Discounting of the Evidence Introduced by the Hotel in the Instant Case to Rebut the Presumption of Union Majority Support Indicates the Inaccessibility to the Employer, Under the Standard as Interpreted, of Independent Means to Make the Requisite Showing 23

B. Since Rebuttal of the Presumption of Continued Majority Support Simply Shifts to the General Counsel the Burden of Establishing a Union's Actual Majority Status in Order to Support a Bargaining Order, the Standard Governing the Employer's Rebuttal Should Be Applied Accordingly.. 26

Conclusion 28

Appendix. Judgment .....App. p. 1

Order 5

Opinion 6

Decision and Order 16

Order 24

Decision 28

TABLE OF AUTHORITIES CITED

Cases Page

Automated Business Systems v. NLRB, 497 F.2d 262 (6th Cir. 1974) 22, 25, 26, 27

Bartenders' Association, 213 NLRB No. 74 (1974) 27

Brooks v. NLRB, 348 U.S. 96 (1954) 12, 13, 20

Burns International Security Services, Inc. v. NLRB, 567 F.2d 945 (10th Cir. 1977), denying enforcement of 225 NLRB No. 40 (1976) 22, 25, 27

Dalewood Rehabilitation Hospital v. NLRB, 566 F.2d 77 (9th Cir. 1977), denying enforcement of 224 NLRB 1618 (1976) 22

Garment Workers v. NLRB, 366 U.S. 731, 6 L.Ed. 2d 762, 81 S.Ct. 1603 (1961) 11, 20

Ingress-Plastene, Inc. v. NLRB, 430 F.2d 542 (7th Cir. 1970) 21, 22, 23, 24

Linden Lumber Div., Sumner & Co. v. NLRB, 419 U.S. 301 (1974) 10

National Cash Register Co. v. NLRB, 494 F.2d 189 (8th Cir. 1974) 23

NLRB v. Dayton Motels, Inc., 474 F.2d 328 (6th Cir. 1973) 21

NLRB v. Frick Co., 423 F.2d 1327 (3rd Cir. 1970) 13, 20

NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) 9, 10, 11, 13

NLRB v. Iron Workers Local 103, 434 U.S. 335 (1978) 8, 9

Page

NLRB v. Laystrom Mfg. Co., 359 F.2d 799 (7th Cir. 1966) 25, 27, 28

NLRB v. Richard Kaase Company, 346 F.2d 24 (6th Cir. 1965) 15, 16, 17, 18

NLRB v. Sheridan Creations, Inc., 357 F.2d 245 (2nd Cir. 1977), enforcing Sheridan Creations Inc., 148 NLRB 1503 (1964), cert. denied 385 U.S. 1005 (1967) 16

Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976) 23

Star Mfg. Co., Div. of Star Forge, Inc. v. NLRB, 536 F.2d 1192 (7th Cir. 1976) 22, 23

Stoner Rubber Co., 123 NLRB 1440, 44 LRRM 1133 (1959) 20, 26, 27

Tahoe Nugget, Inc., 227 NLRB No. 72, 94 LRRM 1343 (1976), enforced NLRB v. Tahoe Nugget, Inc., et al., 584 F.2d 293, 99 LRRM 2509 (1978), petition for certiorari filed, No. 78-1379 (March 9, 1979) 15, 18, 19

Statutes

National Labor Relations Act, Sec. 7 .....2, 12, 14, 19

National Labor Relations Act, Sec. 8(a)(1) 26

National Labor Relations Act, Sec. 8(a)(2) 20

National Labor Relations Act, Sec. 8(a)(5) 11, 12, 14, 17

National Labor Relations Act, Sec. 9(c) 9

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 29, Sec. 157 ....9, 12, 14, 19

United States Code, Title 29, Sec. 159 9

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 8, 1978 in Case No. 77-2415.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 581 F.2d 767. The Order of the Ninth Circuit, denying Petitioner's timely petition for rehearing, is not separately reported. The Decision and Order of the National Labor Relations Board is reported at 229 NLRB No. 151 and the decision of the Administrative Law Judge is appended thereto. All of the aforementioned decisions appear in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 8, 1978. On November 27, 1978, the Court of Appeals for the Ninth Circuit issued an order denying Petitioner's timely petition for rehearing. On February 16, 1979, Mr. Justice Rehnquist signed an order extending the time for filing this petition for certiorari to and including March 23, 1979. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented.

1. Whether application of a presumption that a union enjoys the support of the majority of a single employer's employees in a particular bargaining unit, based upon the fact that such employer has been a party to a series of collective bargaining agreements between that union and a multiemployer bargaining association, unlawfully thwarts the protected rights of employees under Section 7 of the National Labor Relations Act?

2. If such a presumption is applicable, whether the proper standard for determining if an employer has rebutted the presumption must provide the employer with independent means to satisfy his burden of establishing an objectively based good faith doubt of the union's continued majority status? If so, how can the employer properly meet his "burden of proof"?

Statutory Provisions Involved.

United States Code, Title 29:

§157 *Rights of employees*

Employees shall have the right to self-organization, to form, join, or assist labor organizations,

to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

§158 *Unfair labor practices*

(a) It shall be an unfair labor practice for an employer—

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

§159 *Representatives and Elections*

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

. . . .

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . .

(B) By an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Statement of the Case.

Petitioner Sahara-Tahoe Corporation (hereinafter "Sahara Tahoe" or "Hotel") opened for business in 1965. In the spring of 1965 Basta, secretary-treasurer of Bartenders Union Local 86, asked Powell, then personnel manager of the Hotel, whether the Hotel would sign an agreement with Local 86. At that time the Hotel did not employ any bartenders. In April the Hotel joined the Reno Employers' Council ("Council") and in May the Council advised Local 86 that the Hotel had authorized the Council to represent it in labor relations matters pertaining to bartender and culinary workers. The Council further advised Local 86 and Culinary Workers Local 45 that at the time the Hotel began to employ bartenders and culinary workers it would become a party to the preexisting 1962-1965 contract between the Council, the other members of the Council, and Locals 86 and 45. Toward the end of such contract, the Hotel for the first time employed bar and culinary workers who *automatically* became subject to representation by Locals 86 and 45.

As a member of the Council, the Hotel was a party to the bargaining contracts for the periods 1965-1968, 1968-1971, and 1971-1974. In 1968 Locals 86 and 45 merged to become the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (hereafter, "Union"). The Hotel did not actively participate in any of the negotiations with respect to these contracts, and from 1965 until June 1974 the contacts between the Hotel and the Union were extremely limited.

In June 1974 Hotel representatives attended a meeting of the Council at which they learned that the Union was financially insolvent and might merge with Las Vegas locals. About that time a trusteeship was imposed on the Union. Shortly thereafter a number of Union representatives visited the Hotel premises and solicited employees to join the Union. Numerous employees asked Hotel management what was its position with respect to the Union and what would happen "if the Union got in".

In August 1974 Dougall, general manager of the Hotel, read articles in local newspapers concerning interviews with the Union's International trustee. These articles indicated that the International trustee had been brought in to "organize the unorganized" and reported, in actual figures, that the Union represented a very small number of eligible workers.

Dougall contacted his attorney to find out how to ascertain the Union's representative status in the region and at the Hotel. Dougall was advised he could obtain LM-2 forms filed by the Union with the U.S. Department of Labor. Dougall asked if the Hotel could poll its employees and his attorney advised him not to do this. Direct and indirect communication with Union

officials corroborated Dougall's opinion that the Union did not enjoy majority status among the Hotel's employees.

In August 1974 the Hotel timely withdrew from the Council. Dougall notified the Union that negotiations for any future labor contracts would be conducted directly by the Hotel or some other designated individual. In September the Hotel filed a petition with the National Labor Relations Board (hereinafter "Board") for a representation election in the single-employer unit consisting of employees in the Hotel's bar and culinary operations. In October the Hotel by its attorney advised the Union's attorney that the Hotel seriously doubted the Union's majority status among its bar and culinary employees, that it had filed an election petition to resolve the issue, and that it assumed the Union would welcome the opportunity to establish its claim to majority status.

Thereafter the Union filed unfair labor practice charges against the Hotel, including a charge based upon the Hotel's refusal to bargain with the Union. In May 1975 the Regional Director, Region 20, issued a complaint thereupon against the Hotel. Consequently, because of the unfair labor practice allegations filed by the Union, the Regional Director, in June 1975, dismissed the Hotel's election petition.

In January 1976 the Administrative Law Judge recommended that each and every allegation of the complaint be dismissed. Thereafter the General Counsel and the Union filed exceptions, and the Hotel filed cross-exceptions with respect to this decision.

The Board, in June 1977, issued its decision and order affirming the decision of the Administrative Law Judge with respect to all of the charges except the

refusal to bargain charge (and the corollary allegation of refusing to make available a list of employee names and addresses). The Board based its reversal on the refusal to bargain issue on the grounds that (i) the Union enjoyed a presumption of majority support within the Hotel's bar and culinary unit, arising from the multiemployer contract which had existed between the Union and the Council, and (ii) the Hotel failed to establish sufficient objective considerations to support its claim of a reasonable good faith doubt in order to rebut the presumption of the Union's majority support within such unit.

In September 1978 the Court of Appeals for the Ninth Circuit enforced the Board's decision and order holding that the Union was entitled to a presumption of majority support in the single-employer unit and that the Hotel failed to meet the "good faith reasonable doubt" rebuttal standard since the objective considerations established by the Hotel failed to point "unequivocally to a decline in Union support among Petitioner's employees." 581 F.2d at 771. On November 27, 1978, the Ninth Circuit issued an order denying the Hotel's timely petition for rehearing.

REASONS FOR GRANTING THE WRIT.

I.

Employee Freedom of Choice and Majority Rule in the Selection of a Collective Bargaining Representative Are Paramount Principles in Our National Labor Policy Which Are Best Protected and Promoted by Means of the Electoral Process.

The federal labor statutes vest tremendous powers in a duly selected bargaining representative. The rules and regulations written into a collective bargaining agreement establish the "law of the plant", binding both the employer and all employees, the majority supporting a particular bargaining representative as well as the dissenters. Therefore, concern for the guiding principles of freedom of choice and majority rule in employee selection of bargaining representatives has, on numerous occasions, been the focus of attention of this Court.

This Court expressed its concern for such principles in its opinion in *NLRB v. Iron Workers Local 103*, 434 U.S. 335 (1978), as follows:

> " 'There could be no clearer abridgement of §7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity' than to grant 'exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority.' *Garment Workers v. NLRB*, 366 U.S. 731, 737, 6 L.Ed.2d 762, 81 S.Ct. 1603 (1961). This is true even though the employer and the union believe in good faith, but mistakenly, that the union has obtained majority support. 'To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization *of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.*' Id., at 738-739, 6 L.Ed.2d 762, 81 S.Ct. 1603." 434 U.S. at 344. (Emphasis supplied).

This Court's construction of the federal labor statutes is clear. To permit a minority of employees to become the exclusive representative of all employees would not comport with the freedom of choice granted to employees to select a majority representative. 29 U.S.C. §§157, 159.

The federal labor statutes make the *secret ballot election* the primary mechanisms to maintain the critical tension between the often antithetical goals of democratic majoritarianism in employee selection of bargaining representatives on the one hand, and stability in bargaining relationships, on the other. These goals are, of course, not strictly antithetical since industrial stability flows from the exercise of employee choice. Where a bargaining agent is imposed on employees against their will, the consequent dissatisfaction of employees will be expressed in ways which undermine industrial stability.

This Court has announced on numerous occasions that a Board-supervised election and certification under Section 9(c) of the National Labor Relations Act (hereinafter, "Act"), is the normal and preferred route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees. *See, e.g., NLRB v. Gissel Packing Co.,*

395 U.S. 575 (1969); *Linden Lumber Div., Sumner & Co. v. NLRB*, 419 U.S. 301 (1974). As this Court noted in *Gissel, supra:*

> "The board itself has recognized and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." 395 U.S. at 602.

In *Gissel* this Court held that, in the absence of a Board-supervised election and certification, an employer will be obligated to bargain with a particular union *if and only if* the union representative presents "convincing evidence of majority support". *Gissel, supra,* at p. 596. The particular holding in *Gissel* to the effect that authorization cards were a sufficiently reliable indication of a Union's majority support in order to support a bargaining obligation was *expressly limited to circumstances where an employer's unfair labor practices precluded the holding of a fair election* or warranted the setting aside of an election which had been held. 395 U.S. at 601, fn. 18.

Similarly, this Court's subsequent decision in *Linden Lumber, supra,* made clear that absent independent unfair labor practices by an employer which would impair the electoral process, a union which is refused recognition based upon a card showing, has the *burden* of invoking the Board's election procedure. In *Linden Lumber, supra,* this Court held that an employer which has rejected a union's claim of majority status based upon the presentation of authorization cards, cannot be required to bargain *without an election,* if the employer has not committed independent unfair labor practices. This Court recognized that the objective

datum of union majority is far better determined in an expeditious secret ballot election supervised by the Board than in unfair labor practice proceedings under Section 8(a)(5) of the Act.

An employer violates the Act if it voluntarily recognizes a union which has not presented convincing evidence of majority support in the unit it seeks to represent. *Garment Workers, supra.* In the instant case, the record is devoid of *any* evidence that the Union at any time enjoyed the support of a majority of the Hotel's bar and culinary employees. The record indicates that in May 1965 the Hotel voluntarily recognized the Union before it had even hired its bar and culinary employees and that since such event the employees in the Hotel's bar and culinary operations have never expressed support for the Union in any manner, let alone in a "clear and convincing manner." A secret ballot election has never been conducted. The Union never presented authorization cards which were checked by an independent party against a list of employees. Nor has the Union ever established such support by any of the other means enumerated by this Court in *Gissel,* such as a union-called strike or strike vote. *See Gissel, supra,* at p. 597.

Petitioner contends that the Board and the Ninth Circuit, in the instant case, (i) by the application of a presumption of union majority support unjustifiable upon the record, (ii) together with the allocation of an unmeetable rebuttal standard to the employer, have forced a bargaining obligation in violation of the principles and purposes of the Act. Petitioner submits that this Court's review of the administration of the Act in this case is imperative to correct this and similar

abuses before irreparable harm accrues to and results in the industrial sector of the nation.

II.

A Presumption That a Union Enjoys the Support of a Majority of the Employees in a Particular Bargaining Unit Should Not Be Utilized When It Results in a Denial of Employees' Protected Rights Under Section 7 of the National Labor Relations Act.

In this case, the Board and the Ninth Circuit have applied a presumption that a majority of the Hotel's bar and culinary employees support the Union despite the fact that the record is utterly devoid of any evidence to support this presumption. In so doing, the Board and the Court are fostering union representation by thwarting the rights of employees under Section 7 of the Act to "bargain collectively through representatives of their own choosing" *or "to refrain from such activity"*. 29 U.S.C. §157.

In order to hold that an employer has violated Section 8(a)(5) of the Act by its withdrawal of recognition from, and its refusal to bargain further with, a union, it is necessary to find that at the time the employer refused to bargain, the union represented a majority of the employees in the appropriate unit, in the instant case, the Hotel's bar and culinary operations.

Under the Act, the secret ballot election is the prime mechanism to determine the existence of union majority status. In 1954 this Court in *Brooks v. NLRB*, 348 U.S. 96 (1954) upheld the Board's working rule that a *certified* union enjoys an irrebuttable presumption of continuing majority support for a "reasonable period", ordinarily one year, in the absence of "unusual circumstances". Justice Frankfurter's remark toward the conclusion of that opinion is noteworthy. Justice Frankfurter stated,

> ". . . [T]he Board has [furthermore] ruled that one year after certification the employer can ask for an election [footnote omitted] or, if he has fair doubts about the union's continuing majority he may refuse to bargain further with it." 348 U.S. at 104.

Since 1954 the Board has, ostensibly in the interest of industrial stability, utilized numerous presumptions of continued majority support attaching to an initial recognition, *by any means*, even unlawful means, of a union's majority status. The Board's routine utilization of such presumptions, together with the imposition of calculatedly unmeetable rebuttal standards upon employers, results in the frequent insulation of incumbent unions from any duty to demonstrate continued majority support. Nonetheless, some circuits have deferred to this practice of the Board, making it imperative for this Court to rule on this aspect of the Board's administration of the Act which deliberately ignores both the reality of employee sentiment and the possibility of employer good faith, thereby seriously frustrating the purposes of the Act and endangering peaceful labor relations. The Third Circuit in *NLRB v. Frick Co.*, 423 F.2d 1327, 1331-1332 (3rd Cir., 1970), for example, while noting this Court's announcement in *Gissel* that Congress had determined that certain privileges should be dispensed only to certified unions, nevertheless upheld the Board's dispensation of the presumption of continuing majority support to voluntarily recognized unions.

Utilization of such a presumption absolves the union of any responsibility to affirmatively show that it enjoys the support of the majority of the employees whom it claims to represent. Where a Section 8(a)(5) finding results from the utilization of such a presumption, employees are denied the opportunity to freely select their collective bargaining representative through a secret ballot election. Thus, this Court's careful scrutiny of Board utilization of such presumptions is imperative in order to safeguard the employees' protected right under Section 7 of the Act to "bargain collectively through representatives of their own choosing" or to "refrain from such activity." 29 U.S.C. §157.

The mere fact that a union has represented a group of employees in the past should not serve as the basis for a presumption of continued majority support if the circumstances of the particular case destroy the logical and factual bases of the presumption. An historic relationship, standing alone, cannot be permitted to frustrate employee freedom of choice and to impose continued union representation.

In the instant case, the employees comprising the Hotel's bar and culinary complement were added to an already established multiemployer bargaining unit. This was accomplished in 1965 by the mutual consent of the Hotel and the Union without any opportunity for expression of assent or objection on the part of the Hotel's employees since they had not yet been hired. No occasion arose thereafter for a formal certification proceeding or determination of majority support until 1974 when the Hotel withdrew from the Council and filed its election petition seeking to determine whether a majority of its bar and culinary employees desired continued representation by the Union. Thus,

the factual predicate for the presumption that a majority of the Hotel's bar and culinary employees support the Union—prior majority status in the single-employer unit—is totally absent since the Hotel "recognized" the Union before it had hired its bar and culinary employees. As stated by the Sixth Circuit in *NLRB v. Richard Kaase Company,* 346 F.2d 24 (6th Cir., 1965),

> "Before the continuance of the fact of majority support can be presumed, the original existence of the fact must be established." *Id.* at 31.

In its opinion in the instant case, the Ninth Circuit states that resolution of the issue of the applicability of the presumption to the single-employer unit is controlled by its holding *NLRB v. Tahoe Nugget,* 584 F.2d 293 (1978), wherein the court held:

> "When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union." 584 F.2d at 303.

However, unlike the factual situation in *Tahoe Nugget,* when the Sahara-Tahoe joined the Association and thereby voluntarily recognized the Union, it had no bar and culinary employees and thus could not "declare" that such employees favored the Union. Therefore, due to its misplaced reliance on the decision in *Tahoe Nugget,* the Ninth Circuit erroneously concluded that the presumption was applicable to the Hotel since the factual predicate for the presumption, prior majority status, was totally absent.

The further reliance by the Board and the Ninth Circuit upon the fact that the Hotel was a party to a series of collective bargaining agreements between

the Council and the Union, 581 F.2d at 770, in order to find a presumption of majority support is misplaced and conflicts in principle with decisions of the Second and Sixth Circuits.

The decision of the Second Circuit in *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245 (2nd Cir., 1977), enforcing *Sheridan Creations Inc.*, 148 NLRB 1503 (1964), *cert. denied* 385 U.S. 1005 (1967), stands for the proposition that once an employer has entered into a bargaining relationship as a member of a multiemployer association, the *sole operative presumption* affecting his obligation to bargain with the union party to such relationship, once negotiations have begun, is the presumption of continued majority support within *the overall multiemployer bargaining unit*. This presumption of continued majority status in the multiemployer situation, creating a duty on the part of a multiemployer association member to bargain in the multiemployer context regardless of, or contrary to, actual majority status at the single-employer level, provides no basis in fact or in law, for a presumption of majority support in the single-employer unit at the time of withdrawal from the larger unit. Thus, the series of collective bargaining agreements between the union and the multiemployer association would only support a presumption of continued majority support in the multiemployer unit. When the Hotel agreed to such agreements, at most if affirmed majority support in the multiemployer unit. The Hotel did not, either expressly or impliedly, make any representations regarding the Union's majority status among its employees.

In *NLRB v. Richard Kaase, supra,* the Sixth Circuit held that withdrawal from a multiemployer unit vitiated the presumption of majority support in the new single-

employer unit despite the existence of a separate individual contract between Kasse and the union. In that case, the employer was a member of a multiemployer group wherein the union was certified as the representative of all employees in the multiemployer group after prevailing in a multiemployer unit election. Kaase, one of the employers, entered into an individual collective bargaining agreement with the union after the union's certification. Upon the termination of that agreement, Kaase refused to bargain with the union and the union brought charges under Section 8(a)(5) of the Act. The Court of Appeals refused to recognize the transfer of the alleged presumption of continued majority support in the multiemployer group to the single-employer unit, reasoning as follows:

> "In the present case . . . there is no evidence that at the time of the election or at any time thereafter Local 219 was in fact supported by the majority of Kaase's employees; the ambiguity inherent in the multi-employer election here relied on vitiates its efficiency to prove a majority as to any single employer. Before the continuance of the fact of majority support can be presumed, the original existence of the fact must be established." 346 F.2d at 31.

The facts in *Kaase* are more amenable than those in the instant case to a transfer of the alleged presumption from the multiemployer to the individual unit; yet the Sixth Circuit refused to recognize such a transfer. In *Kaase,* although the certification was for the multiemployer group, the union and the company did enter into an individual contract. After that contract expired, the employer declined to bargain with the union unless the union could establish by independent

evidence that it represented a majority of Kaase's employees. The court upheld the position of Kaase that the presumption was not transferable to the new unit. In the instant case, the Hotel never entered into any individual dealings with the Union. The only basis for the conclusion that a presumption of majority status arose in the instant case would be the transfer of such a conclusion from the multiemployer unit to the individual unit. Under the principles articulated by the Sixth Circuit, the ambiguities of the multiemployer situation, not even addressed by the Act, preclude such a transfer.

Petitioner contends that the Ninth Circuit's affirmance of the Board's administrative practice of utilizing a fictional presumption of union majority support without any factual predicate therefor, to serve as the basis for imposing a bargaining order in lieu of the secret ballot election requested by Petitioner, condones a serious abuse of administrative discretion deleterious to the purposes of the Act. In his dissent from the Board's decision in *Tahoe Nugget, Inc.*, 227 NLRB No. 72, 94 LRRM 1343 (1976), enforced *NLRB v. Tahoe Nugget, Inc., et al.*, 584 F.2d 293, 99 LRRM 2509 (1978), petition for certiorari filed, No. 78-1379 (March 9, 1979), Member Walther cautioned the majority against a cavalier use of presumptions at the cost of employee free choice. In his words,

> "It must never be forgotten that an 8(a)(5) finding effectively prevents employees from exercising their right to a *free choice* in the selection of collective bargaining representative—a right these employees have never had an opportunity to exercise. . . .

> It should be recognized that the presumption of continued majority status is in fact nothing more than a convenient legal fiction employed by the Board to insure the stability of the collective bargaining relationship by preventing frivolous and unnecessary interruptions of that relationship. . . . Since they are essentially legal fictions, however, *presumptions should not be employed where they fail utterly to mirror reality* (as when the probability of the fact presumed to be in existence diminishes to nothingness) or when their use comes up against some important contervailing policy consideration (such as employee free choice). *In my opinion, the majority has here extended an acceptable and useful fiction (the presumption of continued majority status) to the point where it no longer reflects probable reality and, instead of promoting bargaining stability, works to the detriment of employee free choice.*" 227 NLRB at 358-59. (Emphasis supplied).

By creating and applying a presumption of majority support which has no basis in fact, the Board and Court, in essence, are utilizing the presumption to support union representation by thwarting employees' protected rights under Section 7 of the Act to "bargain collectively through representatives of their own choosing" or "to refrain from such activity". 29 U.S.C. §157. Although the Ninth Circuit, in its opinion, contends that the presumption of majority support in this case serves to foster industrial stability, that Court's opinion elevates industrial stability over employee freedom of choice and fails to recognize that industrial stability can only flow from employee freedom of choice.

III.

The Standard Governing an Employer's Rebuttal of the Presumption of a Union's Continued Majority Status Must Provide an Employer With a Meaningful Opportunity to Meet Its "Burden of Proof".

Under the Act, an employer has an independent obligation to ensure that a majority of its employees desires union representation before it can lawfully recognize and bargain with a union. If an employer recognizes and bargains with a union not representing a majority of employees in the appropriate unit, it commits an unfair labor practice in violation of Section 8(a)(2) of the Act which prohibits any employer from aiding a minority union. *Garment Workers, supra.*

This Court held in *Brooks v. NLRB, supra,* that a certified union enjoys an irrebuttable presumption of continuing majority status for one year after its certification. The Third Circuit in *NLRB v. Frick Co., supra,* held that a voluntarily recognized union enjoys an irrebuttable presumption of continuing majority status for a reasonable period of time. After such period of "immunity" has elapsed, the presumption of majority support becomes rebuttable. The Board and Courts of Appeals have held that after such period an employer may withdraw recognition from an incumbent union if it affirmatively establishes that, at the time of the withdrawal, either (1) the union no longer in fact enjoyed majority status, or (2) the employer's refusal to bargain was predicated on a reasonably grounded doubt as to the union's continued majority status, asserted in good faith, based upon objective considerations, and raised in a context free of employer unfair labor practices. *See, e.g., Stoner Rubber Co.,* 123 NLRB 1440, 44 LRRM 1133, 1134-1135 (1959);

NLRB v. Dayton Motels, Inc., 474 F.2d 328 (6th Cir. 1973); *Ingress-Plastene, Inc. v. NLRB,* 430 F.2d 542, 546 (7th Cir. 1970).

The facts pertaining to a union's majority status are peculiarly within the competence of the union. Consistent with due process and fair administration of the Act, therefore, the standard which an employer must meet to rebut the presumption of majority status, and the application of such standard, must provide the employer with accessible means to accomplish his independent responsibility under the Act to test a union's majority status. If not, the employer will be placed in a "Catch 22" dilemma, facing an independent obligation which cannot be independently met. It is a fundamental principle of fairness that where a statute imposes on a person an independent obligation, its proper administration and application require that independent means to carry out that obligation be made available under the statute to the person upon whom the obligation is imposed.

The Ninth Circuit's interpretation of the standard for rebutting the presumption of continued majority support creates a situation in which no evidence, other than direct interrogation by an employer of his employees to determine actual union support, will be sufficient to rebut the presumption of majority status. Yet such interrogation by the employer is unlawful under the Act. The Circuit Court's decision, in essence, promulgates a new burden of proof which (1) requires an employer to show unequivocally that a union does not represent a majority of its employees, (2) protects established bargaining relationships and union organizational activity by thwarting employee freedom of choice and majority rule, thus raising a question of exceptional

importance concerning the proper administration of the National Labor Relations Act, and (3) conflicts with the law as applied in other circuits. *See, e.g., Burns International Security Services, Inc. v. NLRB,* 567 F.2d 945 (10th Cir. 1977) *denying enforcement* of 225 NLRB No. 40 (1976); *Automated Business Systems v. NLRB,* 497 F.2d 262 (6th Cir. 1974); *Ingress-Plastene, Inc. v. NLRB, supra; Star Mfg. Co., Div. of Star Forge, Inc. v. NLRB,* 536 F.2d 1192 (7th Cir. 1976).

By discounting the Hotel's evidence that it held a reasonably based, good faith doubt of the Union's continued majority status, on the grounds that none of the factors adduced "pointed unequivocally to a decline in Union support" (581 F.2d at 771) among the Hotel's employees, the Ninth Circuit required the Hotel to demonstrate *actual lack of majority support* in order to rebut the presumption, in conflict not only with earlier decisions in that Circuit, but also with decisions from the other Circuits. *Dalewood Rehabilitation Hospital v. NLRB,* 566 F.2d 77 (9th Cir. 1977), *denying enforcement of* 224 NLRB 1618 (1976); *Star Mfg. Co., supra; Ingress-Plastene, Inc. v. NLRB, supra. See also Burns International Security Services, Inc. v. NLRB, supra.*

Moreover, the Ninth Circuit, by minimizing the cumulative impact of the Hotel's evidence demonstrating, *inter alia,* high turnover rate, Union inactivity, employee expressions of dissatisfaction with the Union, low Union membership, financial difficulties of the Union, and a rigorous Union organizational drive, for the reason that none of such factors pointed "unequivocally to a decline in Union support", places itself in conflict with the Seventh and Eighth Circuits which

have held that the test for evaluating a reasonably based, good faith doubt is not whether one factor could support the doubt, but whether the cumulative force of the combination of factors is sufficient to rebut the presumption. *Star Mfg. Co., supra* at 1195-96; *Ingress-Plastene, Inc. v. NLRB, supra,* at 547; *Royal Typewriter Co. v. NLRB,* 533 F.2d 1030 (8th Cir. 1976); *National Cash Register Co. v. NLRB,* 494 F.2d 189 (8th Cir. 1974).

A. The Ninth Circuit's Discounting of the Evidence Introduced by the Hotel in the Instant Case to Rebut the Presumption of Union Majority Support Indicates the Inaccessibility to the Employer, Under the Standard as Interpreted, of Independent Means to Make the Requisite Showing.

In order to fully comprehend the impact of the Ninth Circuit's decision, the evidence presented by the Hotel in support of its doubt must be reviewed. The Hotel's decision to withdraw recognition from the Union as representative of its bar and culinary employees was based upon its evaluation of the following information: (1) the fact that the Union had never been certified in a Board-conducted election, but rather had been voluntarily recognized when the Hotel joined the multiemployer association prior to hiring its bar and culinary employees; (2) the fact that the Hotel had never been separately represented by the Union; (3) the imposition of trusteeship upon the Union due to financial difficulties and a subsequent major organizational drive indicating to the Hotel a strong probability that the financial difficulties were directly related to lack of employee support; (4) the lack of Union activity within the Hotel as evidenced by the failure to file a single written grievance from 1965 to the onset of organizational activity in the summer of 1974; (5)

questions from a substantial number of employees indicating that they were unaware of the Union and statements by others that they did not desire the Union to represent them; (6) local newspaper articles quoting the Union International trustee's statements regarding a lack of Union membership; (7) Union dues figures obtained from the Union's LM-2 forms indicating a lack of Union financial support and membership; (8) a high rate of employee turnover (300% annually); (9) remarks by an agent of the Regional Office of the Board to the effect that it was common knowledge that the Union did not represent 20% of the employees of any of the employers in the Lake Tahoe area; and (10) remarks by the business agent for another union indicating that Local 86 did not represent more than 5% of the Hotel's bar and culinary employees.

Based upon all these factors as a *whole*, the Administrative Law Judge in the instant case ruled that the Hotel had a sufficient objective basis to reasonably doubt the Union's continued majority status. [ALJD pages 40-41.] The Hotel's doubt of Local 86's continued majority status was based upon all these reasons as a whole and not on any one factor alone. *See, Ingress-Plastene, Inc., supra,* at 546-47. The Ninth Circuit's decision ignored the totality of the evidence relied upon by the Hotel. By so doing, that Court deprived this employer and, by general application, all other employers, of the capability to independently gather sufficient evidence to rebut the presumption of continued majority support. Thus, the effect of the decision is to render the presumption irrebuttable as applied to employers.

The events which transpired in the case of *Burns International Security Services, Inc. v. NLRB, supra,* underscore the problems which arise when an unreasonable and unfair standard is imposed on an employer to show its good faith doubt of majority status. *See also Automated Business Systems v. NLRB, supra; NLRB v. Laystrom Mfg. Co.,* 359 F.2d 799, 801 (7th Cir. 1966).

In *Burns,* two months prior to the expiration of its collective bargaining agreement with a Board-certified union, the employer petitioned the Regional Director for a representation election to determine whether the union actually continued to represent a majority of its employees. With its request, Burns included a statement setting forth numerous factors supportive of its good faith doubt of the union's continued majority status, including employee turnover, employee complaints about the union, a lack of grievances, and the union's failure to replace resigning union officers. The Regional Director found such evidence to be inadequate and instructed the employer to provide necessary evidence supportive of its good faith doubt within 48 hours. Accordingly, Burns notified employees who had previously expressed complaints about the Union of their opportunity to submit their views in writing, an opportunity to which some fifty (50) employees responded. 567 F.2d at 947. The Union then filed charges against the employer alleging, *inter alia,* that the employer acted unlawfully by interrogating and polling its employees. Although the Administrative Law Judge dismissed the union's complaint in its entirety, relying upon the Regional Director's mandate to the employer, such dismissal was reversed by the Board. Thereafter, however, the Tenth Circuit denied enforcement to the

Board's decision and held that the poll, conducted pursuant to the Regional Director's request that Burns procure necessary evidence supportive of its doubt of the union's majority status, did not violate Section 8(a)(1) of the Act.

B. Since Rebuttal of the Presumption of Continued Majority Support Simply Shifts to the General Counsel the Burden of Establishing a Union's Actual Majority Status in Order to Support a Bargaining Order, the Standard Governing the Employer's Rebuttal Should Be Applied Accordingly.

The decision of the Ninth Circuit in the instant case loses sight of the underlying purpose of the presumption, namely to bar frivolous or bad faith challenges to a union's continued majority status, rather than to insulate forever a once-recognized union from the duty to demonstrate its actual majority status.

> "Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit."

Stoner Rubber Co., supra, quoted in *Automated Business Systems v. NLRB, supra.*

The court in *Automated Business Systems* endorsed the *Stoner* position as follows:

> ". . . [A] resolution of a serious doubt concerning majority status by the Board, absent some independent unfair labor practices, *would be ignoring the election process as the best means of determining employee sentiment.* We find the *Stoner* rationale to be persuasive and to be the

> better rule and the one adopted by the courts [citations omitted]. *The General Counsel is in a much better position to prove the majority status* of the union than is the employer." *Automated Business Systems, supra,* fn. 7 p. 271 (Emphasis supplied).

The court's approval of the observation in *Stoner* that "an employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity" (497 F.2d at 270) was borne out by the course of events in *Burns.*

Furthermore, as indicated in *Automated Business Systems,* the effect of the employer's successful rebuttal of the presumption is not to make out a complete defense to its refusal to bargain, *but rather simply to shift the burden of proving majority status to the party best able to do so.*

Indeed a union's refusal to demonstrate its continuing majority through an expeditious election, and an insistent reliance upon the presumptions obtaining in the much more protracted unfair labor practice proceedings, warrant a suspicion that the union is not confident of its majority support and thus would be unable to come forward with evidence to prove its majority status. *Laystrom, supra; Bartenders' Association,* 213 NLRB No. 74 (1974) (Member Kennedy's dissent). As the court stated in *Laystrom, supra:*

> "Good faith is not a one-way street. The union's refusal when challenged to submit the issue to an election where each employee would be permitted in secrecy to make his choice, leads to the inescapable inference that it, too, was doubtful

and fearful of the result. As the Trial Examiner stated:

> 'and it is equally reasonable to speculate that a union may prefer to let the Board handle its hot chestnuts with tongs of technicalities instead of going to an election. A suspicion is not alien in the setting described above that perhaps the union doubts that it could win an election today.' "

359 F.2d at 801.

This suspicion is particularly warranted under the facts of the instant case where the record reveals a multitude of factors indicating that the Union lacks the support of a majority of the Hotel's employees.

Conclusion.

For all of the reasons stated above, the Ninth Circuit's decision enforcing the Board's bargaining order in this case sanctions an administrative abuse resulting in denial of employee free choice and employer due process under the Act.

Petitioner respectfully submits that this Petition for Certiorari should be granted.

Dated: March 22, 1979.

Respectfully submitted,

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APPENDIX.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, Petitioner, v. National Labor Relations Board, Respondent. No. 77-2415.

FILED: 12-5-78.

Before: TUTTLE*, DUNIWAY and WRIGHT, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns on June 2, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on April 14, 1978, and has considered the briefs and transcript of record filed in this cause. On September 8, 1978, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

Petitioner, Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, Stateline, Nevada, its officers, agents, successors, and assigns, shall:

1. Ceases and desist from:

(a) Refusing to recognize and bargain with Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, ALF-CIO, (hereinafter

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*Honorable Elbert P. Tuttle, Senior Circuit Judge, Fifth Circuit, sitting by designation.

called the Union) as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below, with regard to wages, hours, working conditions, and other terms and conditions of employment:

> All employees employed by Respondent in its bar and culinary operations at its Stateline, Nevada, operations, excluding all other employees, guards and supervisors as defined in the Act.

(b) Failing or refusing to supply the Union with a list of unit employees' names and addresses, which information is necessary for the Union to fulfill its collective-bargaining obligations.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the Union as the exclusive bargaining representative in the appropriate unit described above, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request provide the above-named Union with a list of the names and addresses of all unit employees.

(c) Post at its Stateline, Nevada, place of business, copies of the attached notice marked "Appendix". Copies of the notice, on forms provided by the Regional Director for Region 20, (San Francisco, California)

of the National Labor Relations Board, after being duly signed by Petitioner's authorized representative, shall be posted by Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director in writing, within 20 days from the date of this judgment what steps Petitioner has taken to comply herewith.

SO ORDERED:

JUDGES:

/s/ Elbert P. Tuttle
Elbert. P. Tuttle, Senior Circuit Judge
/s/ Ben C. Duniway
Ben C. Duniway, Circuit Judge
/s/ Eugene A. Wright
Eugene A. Wright, Circuit Judge

Endorsed, Decree Filed and Entered
/s/ Emil E. Melfi
Emil E. Melfi
Clerk

Costs in this court in favor of Intervenor and against the Petitioner.

Fees for Clerk's copies & Reporter's Transcript	$ 38.50
Costs of Brief Covers	3.50
Duplication of Briefs	143.36
	$185.36

A TRUE COPY,
ATTEST: Emil E. Melfi
Clerk

APPENDIX

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL recognize and, upon request bargain with Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to wages, hours, working conditions, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All employees employed by the Employer in its bar and culinary operations at its Stateline, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, upon request, provide the above-named Union with a list of the names and addresses of all the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SAHARA-TAHOE CORP., d/b/a
SAHARA-TAHOE HOTEL
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415—556-0335.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

Sahara-Tahoe Corporation, Petitioner, v. National Labor Relations Board, Respondent, and Hotel-Motel Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, Intervenor. No. 77-2415.

FILED: Nov. 27, 1978.

Before: TUTTLE, DUNIWAY and WRIGHT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Wright has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Opinion.

In the United States Court of Appeals, for the Ninth Circuit.

Sahara-Tahoe Corporation, Petitioner, v. National Labor Relations Board, Respondent, and Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, Intervenor. No. 77-2415.

PETITION FOR REVIEW OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-PETITION FOR ENFORCEMENT OF THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Filed: Sept. 8, 1978.

Before TUTTLE*, DUNIWAY and WRIGHT, Circuit Judges.

TUTTLE, Circuit Judge:

Pursuant to 29 U.S.C. § 160(f), Sahara-Tahoe Corporation has petitioned for review of a decision and order of the National Labor Relations Board[1]. The Board has cross-applied for enforcement of its order, and the Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, has intervened in favor of enforcement. The Board found that the Union enjoyed a presumption of majority support among the petitioner's food and beverage employees arising from voluntary recognition of the Union and that the presumption survived the petitioner's withdrawal from a multi-

*Honorable Elbert P. Tuttle, Senior Circuit Judge, Fifth Circuit, sitting by designation.

[1]The Board's decision is reported at 229 N.L.R.B. No. 151 (1977).

employer bargaining unit in 1974. Reversing the conclusion of the Administrative Law Judge, the Board found that petitioner's refusal to bargain was not justified by a reasonable doubt, based on objective considerations, that a majority of its food and beverage employees desired representation by the Union. The Board therefore held that petitioner violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act[2] by withdrawing recognition from and refusing to bargain with the Union, and by refusing to make available, upon request, a list of employee names and addresses.[3] Petitioner argues on appeal that the presumption of majority support is inapplicable on the facts of this case and that it successfully established the reasonable doubt defense. Upon consideration of the arguments of the parties and of the record, we decide to enforce.

The petitioner, a Nevada corporation doing business as the Sahara-Tahoe Hotel, is engaged in the operation of a combination hotel, bar, restaurant, and gaming casino in Stateline, Nevada. In April 1965 the Hotel became a member of the Reno Employers Council and authorized the Council to represent it in labor matters pertaining to its food and beverage employees. Although the Hotel had no food and beverage employees at the time it joined the Council, it was agreed and understood that upon hiring such personnel the Hotel would become a party to the extant collective bargaining agreement between the Council and the

[2]29 U.S.C. §§ 158(a)(1) and 158(a)(5).

[3]The original complaint issued by the N.L.R.B. alleged several additional violations. The Administrative Law Judge recommended that these additional allegations be dismissed, and the Board adopted that recommendation. The other alleged violations are not relevant to this appeal.

Union. According to petitioner, it thereby entered a "pre-hire collective bargaining agreement" with the Union.[4]

After that agreement expired in November 1965, the Hotel was a party to a series of successive collective bargaining agreements between the Council and the Union. The last such agreement ran from December 1, 1971, until November 30, 1974. Each agreement contained a clause extending voluntary recognition of the Union by the Hotel as the exclusive representative of its food and beverage employees.

On August 2, 1974, the Hotel withdrew from the Council and, on August 5, informed the Union of its willingness to negotiate a separate agreement between the Hotel and the Union. On September 27, 1974, the Hotel filed a petition with the Board seeking a representation election in a single employer unit consisting of its food and beverage employees.[5] On October 29, 1974, the Hotel withdrew its recognition of the Union, stating in a letter to the Union that "we seriously doubt that you represent a majority of the hotel's culinary and bar employees." Since that time, the Hotel has refused to bargain collectively with the Union as the representative of its food and beverage

[4]On May 11, 1965, the general manager of the Council advised the Culinary Workers Union Local 45 and the Bartenders Union Local 86, later merged to become the Union, by letters that the Council had been authorized to represent the Hotel. Both of these letters contained the following statement:

> *At the time* when the Sahara Tahoe Hotel, Stateline, Nevada, employs bartenders and culinary workers, the hotel *shall become* a party to the Agreement commonly known as the Agreement between the Reno Employers Council and the Lake Tahoe Area employers. . . .

(Emphasis added.)

[5]Shortly after the complaint was issued in this case, the election petition was dismissed.

employees. The Hotel did, however, maintain the then existing agreement until its expiration and dealt with the Union concerning grievances during its term. In November 1974, the Union requested a list of unit employees' names and addresses. The Hotel has refused to supply such a list.

To sustain a refusal to bargain charge, the General Counsel must show that the Union represented a majority of the unit employees when the Hotel refused to bargain. As a general rule, an uncertified but voluntarily recognized union enjoys a conclusive presumption of majority status for a reasonable time, usually one year, after voluntary recognition and a rebuttable presumption thereafter.[6] *NLRB v. Tahoe Nugget, Inc., et al.*, ... F.2d ..... (9th Cir., August 10, 1978, Nos. 77-2095/2105). "The presumption is rebutted if the employer shows, by clear, cogent, and convincing evidence, that the union was in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal." Id. at .....

The Hotel presents three arguments to the Court: (1) that the normal rebuttable presumption did not arise from the Hotel's execution of a pre-hire bargaining agreement with the Union; (2) that the presumption did not survive the Hotel's timely withdrawal from the multi-employer Council; and (3) that, assuming a presumption is operative, substantial evidence on the record as a whole does not support the Board's conclusion that the Hotel failed to establish a good faith reasonable doubt.

[6]*See* NLRB v. Lee Office Equipment, 572 F.2d 704, 706 (9th Cir. 1978); NLRB v. Cayuga Crushed Stone, Inc., 474 F.2d 1380 (2d Cir. 1973); NLRB v. San Clemente Publishing Corp., 408 F.2d 367 (9th Cir. 1969).

Presumption of Majority Support

The Hotel first contends that as a result of the circumstances under which the Union obtained its initial recognition by the Hotel, the normal presumption of majority support never arose. Characterizing the 1965 agreement between the Union and the Hotel as a pre-hire agreement made before the Hotel employed any food and beverage employees, the Hotel argues that a pre-hire agreement does not rest upon a showing of majority support and thus cannot create a presumption of continuing majority support. The Hotel cites in support of its argument *NLRB v. Local No. 103, Int'l Assoc. of Bridge Structural & Ornamental Iron Workers,* 46 U.S.L.W. 4081 (U.S. Jan. 17, 1978). To recognize the presumption in such a situation, according to the Hotel, would be irreconcilable with § 8(f) of the Act,[7] which provides that the existence of a pre-hire agreement in the building and construction industry does not constitute an unfair labor practice and does not bar the holding of a certification election under §§ 9(c) and 9(e) of the Act. The Hotel further argues that the pre-hire agreement was unlawful on its face because the Hotel was not "engaged primarily in the building and construction industry," as required

[7]In pertinent part, § 8(f) provides that:

> It shall not be an unfair labor practice . . . for an employer *engaged primarily in the building and construction industry* to make an agreement covering *employees engaged* (or who, upon their employment, will be engaged) *in the building and construction industry* with a labor organization *of which building and construction employees* are members . . . because (1) the majority status of such labor organization has not been established . . . prior to the making of such agreement. . . . *Provided further,* that any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title, 29 U.S.C. § 158(f) (emphasis added).

by § 8(f), and therefore cannot give rise to a presumption of majority support. Finally, the Hotel argues that § 10(b) of the Act[8] does not foreclose raising the existence of the unlawful pre-hire agreement to challenge the applicability of the presumption.

We find it unnecessary to respond to these arguments in detail or to determine whether the 1965 agreement constituted a pre-hire agreement at all. The Hotel's argument overlooks the fact that, in addition to the 1965 agreement, the Hotel was a party to a series of successive agreements all of which granted voluntary recognition to the Union *after* the Hotel had hired food and beverage employees. The presumption of majority status is clearly applicable in this case because it certainly arises from the most recent agreement, rendering the effect of the purported pre-hire agreement irrelevant.

The Board appears to have recognized this point because it stated in its decision:

> It is well settled that the existence of a *prior contract,* lawful on its face, raises a dual presumption of majority—a presumption that the Union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract. Following the expiration of the contract, the presumption continues and, though

[8]Section 10(b) of the Act, 29 U.S.C. § 160(b), provides in part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." Although the section refers expressly to the issuance of a complaint, this Court has held that evidence of an unfair labor practice that occurred beyond the § 10(b) period could not be admitted in defense of a refusal to bargain charge. NLRB v. Tragniew, Inc., 470 F.2d 669 (9th Cir. 1972).

> rebuttable, the burden of rebutting it rests on the party who would do so.

(Emphasis added; footnote omitted). This statement demonstrates that the Board was not looking backwards to the first agreement which bound the Hotel and the Union but to the existence of an ongoing bargaining relationship renewed in successive agreements. The presumption of majority support in this situation serves to foster stability of a bargaining relationship which had endured for nine years. *See NLRB v. Tahoe Nugget, supra.*

The Hotel's second argument—that the presumption of majority support did not survive its withdrawal from the multi-employer unit—has been fully addressed by this Court in *NLRB v. Tahoe Nugget, supra,* and the holding in that case controls the resolution of the issue here. We said in *Tahoe Nugget:*

> When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violate the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined

> from the employer's own conduct to favor union representation.

Id. at ..... (footnote omitted). Consequently, we hold that the Board was correct in applying a presumption of majority support in this case.

Reasonable Doubt Defense

The Administrative Law Judge found, and the Board agreed, that no single factor relied upon by the Hotel supported a good faith reasonable doubt that the Union lacked majority status at the time of the Hotel's refusal to bargain. However, the ALJ held that the factors viewed in their totality established the defense and rebutted the presumption. The Board rejected this conclusion because of the speculative and subjective nature of the evidence and because the circumstances, standing alone or viewed in their totality, in no way reflected the sentiments of a majority of the Hotel's employees. Consequently, the Board held that the petitioner had failed to establish the good faith reasonable doubt defense. Substantial evidence on the record as a whole supports this finding; hence, we enforce.

The Hotel asserted several factors which it claimed demonstrated a reasonable doubt. Many of these same factors were present in *Tahoe Nugget, supra,* and we upheld the Board's determination that the respondents there had failed to rebut the presumption of majority support. We see no necessity for a prolonged discussion of these factors for our reasoning in *Tahoe Nugget* applies here. Thus, evidence of a high turnover rate, union inactivity prior to the summer of 1974, low Union membership, financial difficulties of the Union, and a vigorous membership drive were all properly accorded only minimal weight by the Board. None

of these factors pointed unequivocally to a decline in Union support among petitioner's employees. Moreover, by the time of the refusal to bargain, the Union had begun to show renewed interest in the Hotel's employees. The Union inspected working conditions, received employee complaints, filed several grievances, and solicited suggestions for bargaining demands. Hence, reliance on inactivity prior to June to support withdrawal of recognition in October ignores the intervening events. As for high turnover, it is well established that new employees are presumed to support the Union in the same ratio as their predecessors. *NLRB v. Tahoe Nugget, supra.* We have held before that union membership is not the equivalent of Union support. *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976). This is particularly true in a right to work state like Nevada, where employees may choose not to join a union but nevertheless desire union representation. *Terrell Machine Co. v. NLRB*, 427 F.2d 1088 (4th Cir. 1970).

The Hotel also introduced evidence that a number of employees asked what would happen if the Union "got in" and otherwise demonstrated ignorance of Union representation. However, this ignorance is not necessarily indicative of a desire not to have the Union represent them. Moreover, these remarks came from only a small percentage of employees out of a work unit of 525 to 750 employees.

The newspaper reports which referred to low union membership are not persuasive. The articles dealt with

union membership in a general area and said nothing of an actual lack of union support at the Hotel. The remarks of a business agent of another union and of an agent of the NLRB to the effect that the Union represented only 5% or 20% of the area employees are similarly flawed. The Board attributed little importance to these offhand opinions, and we agree that they do little to further the Hotel's defense.

As in *Tahoe Nugget, supra,* while some of the evidence points to a decline in Union support within the bargaining unit, nevertheless, the cumulative weight of all of the evidence is not enough to rebut the presumption. It is ambiguous at best and we see no reason to disturb the Board's finding that

> the web [of circumstances] contains not a single thread of evidence that the employees themselves had told [the Hotel] that they no longer wanted the Union to represent them. Indeed, the web contains not a single thread of evidence that reflects or even purports to reflect the sentiments of the employees themselves—any unit employee much less a majority of the unit employees—on the question of union representation. Absent such threads, the web of circumstances is like the Cheshire cat's grin—nothing behind it.

In view of the holding on the refusal to bargain charge, we also agree that the refusal to provide the list of employees' names and addresses was unlawful.

The Board's order is enforced.

Decision and Order.

United States of America, Before the National Labor Relations Board.

Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel and Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL—CIO. Case 20—CA—9623.

On January 21, 1976, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, General Counsel and Charging Party filed exceptions and briefs, Respondent filed cross-exceptions and a brief, and Charging Party filed a brief in reply to Respondent's cross-exceptions.

Pursuant to the provision of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclu-

[1]While we agree with the Administrative Law Judge that Respondent's meals benefits policy announced in August 1974 constituted a lawful change, we note as an additional ground the fact, which he inadvertently overlooked, that there was a meal benefit provision in the collective-bargaining agreement in effect between 1971 and 1974.

General Counsel, Respondent, and Charging Party have all excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

sions[2] of the Administrative Law Judge, to the extent consistent herewith.

Contrary to the Administrative Law Judge, we find that Respondent Sahara-Tahoe's withdrawal of recognition from and its refusal to bargain with the long-established bargaining representative of its employees was not legally justifiable and in fact constituted a violation of Section 8(a)(5) of the Act.

It is well settled that the existence of a prior contract, lawful on its face, raises a dual presumption of majority —a presumption that the Union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.[3] Following the expiration of the contract, the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so.[4] To withdraw recognition lawfully, either this presumption must be overcome

[2]We find it unnecessary to pass on the Administrative Law Judge's conclusion that the contractual provision granting Respondent "the right to increase any privileges, benefits or wages provided for by this Agreement" without bargaining with the Union about it covered its unilateral institution of dental, vision, and disability insurance. Since such benefits were granted to Respondent's employees who were not under the contract, we agree with the Administrative Law Judge that Respondent was required to include the employees in the contractual unit in this grant of benefits, pursuant to art. II, sec. 4A, of the contract.

[3]*Shamrock Dairy, Inc., Shamrock Dairy of Phoenix, Inc., and Shamrock Milk Transport Co.*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C., 1960), cert. denied 364 U.S. 892. See also *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho*, 213 NLRB 651 (1974).

[4]*Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom. N.L.R.B. v. Tragniew, Inc., and Consolidated Hotels of California*, 470 F.2d 669 (C.A. 9, 1972).

by competent evidence that the Union in fact did not represent a majority at the time of the withdrawal,[5] or the Employer must establish on the basis of objective facts that it had a reasonable doubt as to the Union's continuing majority status. This latter test, which Respondent claims it meets, requires more than mere evidence of the Employer's subjective state of mind.[6] For the test to be met, the assertion must be supported by objective considerations; that is, some reasonable ground for believing that the Union has lost its majority status.[7]

Briefly, the record shows that between 1965 and 1974 Respondent belonged to a multiemployer association which bargained and entered into successive contracts with the Union. The last contract to which Respondent was a party expired on November 30, 1974.[8] Before this contract expired, Respondent timely withdrew from the multiemployer association on August 2 and notified the Union on August 5 that it would bargain with it individually.[9] In mid-September, some 5 weeks after it agreed to bargain with the Union for a new contract, Respondent allegedly began to harbor

[5]No such evidence is present in this record.

[6]*Celanese Corporation of America,* 95 NLRB 664 (1951).

[7]*Laystrom Manufacturing Co.,* 151 NLRB 1482, 1483 (1965), enforcement denied 359 F.2d 799 (C.A. 7, 1966). See also *Emerson Manufacturing Company, Inc.,* 200 NLRB 148 (1972), and *Terrell Machine Company,* 173 NLRB 1480 (1969), enfd. 427 F.2d 1084 (C.A. 4, 1970), cert. denied 398 U.S. 929.

[8]All dates are 1974 unless otherwise indicated.

[9]The presumption of majority status arising from Respondent's voluntary recognition of the Union as the exclusive bargaining representative of its employees continued after its withdrawal from the multiemployer association. *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget,* 227 NLRB No. 72 (1976).

doubts about the Union's representative status based on the following circumstances: (1) the relative inactivity of the Union prior to June when the Union was placed in trusteeship; (2) certain questions from employees about the Union; and (3) newspaper reports, remarks by an agent for another union, comments by a Board agent, and the high turnover of unit employees.

The Administrative Law Judge found, and we agree, that not one of the factors relied on by Respondent standing alone supports a good-faith doubt that the Union has lost majority status. However, he held that there was a reasonable basis for questioning whether a majority of Respondent's employees supported the Union when the factors relied on by Respondent are "viewed in their totality." We disagree entirely because of the speculative and subjective nature of the information on which Respondent based its calculations of union strength and because the circumstances, standing alone or in their totality, in no way reflect or even purport to reflect the sentiments of a majority of Respondent's employees on the question of union representation.

1. *The relative inactivity of the Union prior to June when the Union was placed in trusteeship:* Reliance on these circumstances is misplaced.[10] Thus there is no contention that the Union ever abandoned its representative status. Nor has Respondent pointed to a single instance where the Union failed to represent an employee properly or where an employee expressed dissatisfaction because the Union failed to represent

[10]As the Administrative Law Judge points out, the trusteeship is an internal union matter and is not probative of whether or not the Union represented a majority of Respondent's employees.

him. In such circumstances, the Union's limited contacts with Respondent may merely indicate that the Union and Respondent enjoyed a harmonious relationship and that the Union was given no reason to file written grievances. Absent any expression of dissatisfaction with the Union by the employees themselves, the Union's limited contacts with Respondent prior to June are no gauge of the level of employee support for the Union.

Moreover, the timing of Respondent's alleged doubt about the Union's majority's status is curious. Thus Respondent claims that it began to harbor doubts about the Union's majority status during the month immediately following its withdrawal from the multiemployer bargaining unit[11] and its announcement that it would bargain individually with the Union about a new contract. Also, this alleged doubt came in the face of renewed activities by the Union on behalf of the employees. In addition to the Union's organizational drive, the record discloses that the Union also exchanged correspondence with Respondent, inspected working conditions, received employee complaints, filed two grievances in July and two more thereafter, and solicited suggestions for bargaining demands. Hence, Respondent's asserted reliance on the Union's alleged inactivity *prior to June* to support withdrawal of recognition from the Union in *October* is contrary to the intervening events; namely, Respondent's letter to the Union in August that it would bargain about a new contract

[11]Respondent's withdrawal from the multiemployer bargaining unit is of no significance in rebutting the presumption of continued majority support for the Union. See fn. 9. Indeed, to hold otherwise would be in effect to allow Respondent to create by its own actions a factor to challenge or rebut the presumption.

and the Union's activity in administering its agreement with Respondent during the period July through October.

2. *Certain questions from employees about the Union:* The fact that a number of employees asked Respondent's supervisors what would happen if the Union "got in" would, at most, show that some employees did not know that the Union already represented the employees and that the Union had a contract with Respondent. The employees asking this question did not indicate to Respondent, however, that they did not want the Union to represent them. Indeed, such an inference is untenable in light of the total absence of record evidence indicating dissatisfaction with the Union by Respondent's employees. Moreover, such informational inquiries would be entitled to little weight as indicating the attitude of employees other than those asking the question. It is clear that only a small percentage of Respondent's employees spoke to Respondent about the Union.

3. *Newspaper reports, remarks by an agent for another union, comments by a Board agent, and the high turnover of unit employees:* The law is clear that new employees are presumed to support a union in the same ratio as those whom they replaced.[12] Here, there is no independent evidence from which it may be inferred that Respondent's new employees did not want the Union to represent them. Hence turnover of Respondent's employees cannot be used, by itself, as a basis for a belief that the Union lost majority support.

[12]*Laystrom Manufacturing Co., supra*; see also *Emerson Manufacturing Company, Inc., supra;* and *Terrell Machine Company, supra.*

Two newspaper reports asserted, in effect, that the Union represented less than a majority of the employees covered by the multiemployer contract. The short answer to the newspaper reports is that they dealt with industry conditions in the Tahoe-Reno area generally rather than with the situation in the *unit* of Respondent's employees. Indeed these newspaper reports pertain to the "employees covered by the multiemployer contract" and not to the unit of Respondent's employees. This difference is significant, especially because Respondent had earlier voluntarily removed itself from the multiemployer unit and had acknowledged by its letter of August 5 that it would bargain individually with the Union about a new contract.

But equally important, it is plain that the figures contained in the newspaper reports referred to "dues paying members." Thus the articles dealt with union *membership* rather than union *support*. That Respondent understood that the articles referred to union membership is demonstrated by its subsequent effort to verify the number of dues-paying members; i.e., Respondent reviewed the LM—2 forms filed with the U.S. Department of Labor and concluded that the Union had between 1,000 and 1,800 dues-paying members in the Tahoe-Reno area. It is well settled, however, that:[13]

> . . . a showing as to employee membership in, or actual financial support of, an incumbent union is not the equivalent of establishing the number of employees who continue to desire representation by that union. There is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof.

Consequently, even if Respondent had a reasonable basis for believing that a majority of its employees were not union members or did not financially support the Union, such knowledge does not establish a reasonable basis for believing that the Union had lost majority support.[14]

The Respondent also relies on comments made by a Board agent and a representative of another union. Like the newspaper reports, these two individuals described industry conditions in the Tahoe-Reno area. Neither of these outside parties had any personal knowledge of the Union's support among Respondent employees. Thus, these offhand opinions based on multiple hearsay have little or no probative value.

Although the Administrative Law Judge found that not one of the factors relied on by Respondent supports a good-faith doubt, he nevertheless found that a web of circumstances justified such doubt. However, the web contains not a single thread of evidence that the employees themselves had told Respondent that they no longer wanted the Union to represent them. Indeed, the web contains not a single thread of evidence that reflects or even purports to reflect the sentiments of the employees themselves—any unit employee much less a majority of the unit employees—on the question of union representation. Absent such threads, the web

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[13]*Orion Corporation,* 210 NLRB 633 (1974); *Terrell Machine Company, supra.*

[14]Moreover, Respondent's attempt to use low union membership as a gauge of union support is especially tenuous because Nevada is a "right to work" State. See *Wald Transfer & Storage Co. and Westheimer Transfer & Storage Co., Inc.,* 218 NLRB 592 (1975), enfd. 535 F.2d 657 (C.A. 5, 1976).

of circumstances is like the Cheshire cat's grin—nothing behind it.

Accordingly, we find that the evidence relied on by the Respondent, standing alone or in its totality, fails to establish a reasonable doubt based on objective considerations that a majority of the unit employees no longer wanted the Union to represent them. Hence, we find that Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union.

In view of this finding, we further find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to make available to the Union, upon request, a list of employee names and addresses. Respondent's refusal to provide this information was predicated on its doubt that the Union represented a majority, which led to its withdrawal of recognition. As we have found the withdrawal unlawful, we also find the refusal unlawful and shall order the Respondent to supply the information requested.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, Stateline, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below, with regard to wages, hours, working conditions, and other terms and conditions of employment:

> All employees employed by Respondent in its bar and culinary operations at its Stateline, Nevada, operations, excluding all other employees, guards and supervisors as defined in the Act.

(b) Failing or refusing to supply Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, with a list of unit employees' names and addresses, which information is necessary for the Union to fulfill its collective-bargaining obligations.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative in the appropriate unit described above, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request provide the above-named Union with a list of the names and addresses of all unit employees.

(c) Post at its Stateline, Nevada, place of business, copies of the attached notice marked "Appendix".[15] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. June 2, 1977.

John H. Fanning,
Chairman

Howard Jenkins, Jr.,
Member

Betty Southard Murphy,
Member

NATIONAL LABOR RELATIONS
BOARD

(Seal)

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[15]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL recognize and, upon request bargain with Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to wages, hours, working conditions, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All employees employed by the Employer in its bar and culinary operations at its Stateline, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, upon request, provide the above-named Union with a list of the names and addresses of all the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SAHARA-TAHOE CORP., d/b/a
SAHARA-TAHOE HOTEL
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415—556-0335.

Decision.

United States of America, Before the National Labor Relations Board, Division of Judges, Branch Office, San Francisco, California.

Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel and Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. Case No. 20-CA-9623.

Stuart R. Dvorin and *Eileen H. Hamamura, Attorneys,* of San Francisco, Calif., for the General Counsel.

Parker, Milliken, Kohlmeier, Clark & O'Hara by *Anthony T. Oliver, Jr.,* and *William H. Emer, Attorneys,* of Los Angeles, Calif., for the Respondent.

Davis, Cowell & Bowe by *Richard G. McCracken, Attorney,* for the Charging Party.

Statement of the Case

RICHARD D. TAPLITZ, Administrative Law Judge: This case was tried at South Lake Tahoe, California, on September 9, 10, 11, 12, 16, 17 and 18, 1975. The charge and five amended charges were filed by Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union, on October 8, 1974, November 19, 1974, December 3, 16 and 18, 1974, and May 30, 1975. The complaint, which issued on May 30, 1975, alleges that Sahara-Tahoe Corporation d/b/a Sahara-Tahoe Hotel, herein called Respondent, violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended.

Issues

The primary issues are:

1. Whether Respondent violated Section 8(a)(1) of the Act by:

(a) Granting to its employees increases in vacation, holiday and meal benefits in order to induce them to abandon their support for the Union.

(b) Granting disability insurance benefits to its employees in order to induce them to abandon their support for the Union.

2. Whether Respondent violated Sections 8(a)(5) and (1) of the Act by:

(a) Unilaterally instituting dental and vision care insurance benefits, meal benefits and disability insurance benefits without bargaining with the Union.

(b) Unilaterally changing conditions of employment by prohibiting union representatives from entering the basement area of its premises for the purpose of investi-

gating the standing of employees or job conditions as permitted by its collective-bargaining contract with the Union.

(c) Refusing upon request to supply the Union with a list of the names and addresses of employees in the bargaining unit.

3. Whether Respondent violated Sections 8(a)(3) and (1) of the Act by laying off Dolly Smith because of her activities on behalf of the Union.

4. Whether Respondent violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with and by withdrawing recognition from the Union.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Extensive briefs, which have been carefully considered, were filed on behalf of the General Counsel, Respondent and the Charging Party.

Upon the entire record[1] of the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a Nevada corporation with a place of business in Stateline, Nevada. It is engaged at that

[1]The unopposed motion of Respondent to correct the transcript of the record is hereby granted as follows: p. 33, l. 15, change "proceeding" to "association"; p. 254, l. 11, change "using" to "losing"; p. 438, l. 24, change "Glen" to "Bill"; p. 726, l. 25, change "unit" to "agreement"; p. 749, l. 8, change "Den" to "Bienz"; p. 814, l. 15, change "not" to "no"; p. 859, l. 23-24, change "binns" to "Bienz"; p. 1029, l. 21, change "30th" to "11th"; p. 1078, l. 21, change "couldn't" to "could."

location in the operation of a combination hotel, bar, restaurant and gambling casino. During the year immediately preceding issuance of complaint, Respondent, in the conduct of its business operations, received gross revenue in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from outside the State of Nevada. The complaint alleges, the answer admits and I find that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Sections 2(2), (6) and (7) of the Act.[2]

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Introduction*

Respondent has collective-bargaining contracts with a number of different labor organizations who represent various categories of employees at its Stateline facility.[3] For many years Respondent had successive collective-bargaining agreements with the Union covering its bar and culinary employees.[4] The contracts covering those employees were negotiated by the Reno Employers Council, herein called the Association,[5] of which Re-

[2]See *The Anthony Company d/b/a El Dorado Club,* 220 NLRB No. 152.

[3]Respondent had contracts with the Engineers, Painters and Carpenters in addition to those it had with the Union.

[4]The Respondent still has a current separate collective-bargaining agreement with the Union covering its hotel service employees.

[5]The Association is a voluntary association of employers engaged in the casino and other industries. It represents its employer-members in negotiating and administering collective-bargaining agreements on behalf of its employer-members with various labor organizations.

spondent was a member. Respondent has never had an individual contract covering those employees but has been part of a multi-employer bargaining unit. The last contract expired by its terms on November 30, 1974.[6] On August 2, 1974, Respondent timely withdrew its membership from the Association. On September 27, 1974, Respondent filed a petition with the Board seeking an election. On October 29, 1974, Respondent notified the Union that it doubted the Union's majority status and since then Respondent has refused to negotiate a new collective-bargaining agreement with the Union. The complaint alleges that during the summer and fall of 1974, Respondent engaged in an unlawful campaign to undermine and to discourage membership in the Union. Based on the issuance of the complaint, Respondent's petition for an election was dismissed.[7]

B. *The Changes in Benefits*

1. The changes that were made

The last contract between Respondent and the Union which covered Respondent's bar and culinary employees was effective by its terms from December 1, 1971 through November 30, 1974. During the term of that

[6]Nevada is a "right to work" state and the contract does not contain a union-security clause.

[7]The dismissal letter, which was dated June 20, 1975, stated in part:

> "The undersigned . . . issued complaint on May 30, 1975, alleging, inter alia, that the Employer has violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union. Accordingly, it is concluded that no question concerning representation exists and the petition is therefore dismissed.
>
> The petition is subject to reinstatement, if appropriate, upon the petitioner's application after disposition of the unfair labor practice proceeding."

contract, Respondent made numerous changes, some of which were substantial in amount, in the wages of covered employees. The last of those changes was on August 19, effective August 18, 1974. Respondent did not notify or bargain with the Union concerning those changes. The Union did not file a grievance concerning those changes nor are those changes the subject of any unfair labor practice proceedings. The changes were made pursuant to a clause in the contract that provided as follows:

> Article I. Section 6. *Employer May Increase Benefits, Privileges and Wages Without Prejudice.*
>
> The Employer is granted the right to increase any privileges, benefits or wages provided for by this Agreement. In the event the Employer does increase any such benefits, wages, or privileges he may, without prejudice, reduce said benefits, wages or privileges at any time he may choose to do so, provided that, under no circumstances, will any employee covered hereunder be paid, or given less than the minimum benefits, wages and privileges provided for herein.

During the term of the contract, Respondent had on a number of occasions increased the pay of employees, but until August 27, 1974, it had not made changes or added benefits relating to vacation, holiday, meal, disability insurance (also called income protection benefits), dental or vision benefits.

On August 27, 1974, Respondent distributed to its employees a notice which said in part:

> In keeping with management's policy to improve benefits whenever possible, I am pleased to announce the following additions to, or changes in,

existing benefits. This applies to all employees unless otherwise noted herein. Benefits to be effective September 1, 1974:

1. Vacation Policy
2. Holiday Policy
3. Dental and Vision Care Insurance
4. Employer provided meals

* * *

Some of you, including hotel services, housekeeping, painters, carpenters and engineers are covered by union contracts which preclude us from making some of these changes without first negotiating them through the Union involved. We learned this the hard way because the last time we increased wages for housekeeping and hotel service employees, Culinary Union Local 86 (the union representing those employees as well as the food and bar employees) filed an unfair labor practice charge with the National Labor Relations Board protesting the unilateral wage increase. [The housekeeping and hotel service employees are covered by a different contract than that which is applicable to the bar and culinary employees.]

Since some of the benefit increases are applicable to almost all employees, all of you are urged to attend one of the meetings.

Thereafter, meetings were held to explain the new benefits.

On August 28, 1974, Respondent distributed a memo to "All Employees EXCEPT Room, Telephone Transportation, Engineer & Maintenance Departments," describing a new vacation program which was made effective as of July 1, 1974. Under that policy sick pay

was combined with vacation pay and the existing contract benefits were increased.

By a memo dated August 29, 1974, to the same employees with the same exclusions, the employees were notified that Respondent was granting seven paid holidays per year effective as of September 1, 1974. Prior to that time employees in the bargaining unit had received four holidays.

By a memo dated August 29, 1974, the same employees with the same exceptions were notified that effective September 1, 1974, each employee was to receive one free meal during each 8-hour shift worked and an additional meal if the employee worked 4 hours or more overtime. Prior to that time there was no uniform policy with regard to free meals and employees in different categories were treated differently.

By a memo dated October 17, 1974, Respondent notified all its employees that effective November 1, 1974, improvements were being made in the existing medical insurance plan by a reduction in the waiting period for eligibility and by the absorption by Respondent of the entire cost of insuring eligible dependents. The complaint does not allege that this change was a violation of the Act.

By a memo dated November 18, 1974, all employees who were covered by Respondent's group medical insurance were notified that effective November 1, 1974, a disability insurance plan was put into operation.[8] Prior to that time no disability insurance was provided by Respondent.

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[8]This plan was also referred to as an income protection plan.

The vacation, holiday, meal, disability, dental and vision plans were all put into effect by Respondent on about the dates indicated in the various memos.

2. The reasons for the changes

a. *Background*

William M. Dougall became general manager of Respondent in February 1974. Respondent's employee complement varies considerably, with a peak of about 2,000 employees in the summer and a low of about 1,500 employees in the winter. In April or early May 1974, Dougall, in anticipation of his first peak season, asked Respondent's personnel director, Vesta Valentine, whether they would have enough help during the upcoming busy season. Valentine explained to him that there would be more difficulty in obtaining employees than there had been in prior years. She pointed out that the competition for employees between Respondent and other hotel-casinos would be more extreme because some of the competing casinos had opened extensive new hotel facilities.[9] She also informed him that foreign nationals could not be hired as they had in the past because of governmental restrictions. In addition, she said that some of the competitors were providing housing for the lower paid employees. Dougall and Valentine discussed the existing practice of taking wage and benefit surveys for all competing establishments every 6 months. He was informed by Valentine that such surveys were made by calling the other companies and obtaining the information. Respondent has raised wagers in the past because of those surveys.

[9]Respondent has about 535 rooms and 6 restaurants. One of the competitors, Harrah's, opened a 250-room hotel in the summer of 1974. Another competitor, Harvey's, opened a new facility called Harvey's Inn, which has 125 rooms.

b. *Vacation benefits*

Jess Hinkle is president of Del Webb Hotels International, Respondent's parent corporation. On May 13, 1974, Hinkle sent a memo to Dougall and the general managers of seven other hotels in the Del Webb chain setting forth a new policy with regard to vacation and sick pay was applicable to "all employees not subject to collective bargaining."[10]

On June 3, 1974, Dougall sent a memo to Valentine telling her that, pending the forthcoming labor negotiations with the Carpenters and the Painters, he wanted to commence the new vacation policy on July 1 and to publish a notice to all employees on or about June 15. Valentine did not publish the notice until August 28, 1974, because of problems in getting accrued vacations programmed on computers. However, the new benefits were made retroactive to July 1, 1974. The vacation policy was to apply only to employees not subject to collective bargaining, but as the new policy was equal to or better than most of the vacation provisions of the collective-bargaining agreements and Respondent believed that under the bartender and culinary contract as well as certain other contracts it could be adopted more generally, the new policy was applied to most of Respondent's employees, including the bartender and culinary employees. The new policy was applied to 1,866 persons employed by Respondent (some of them had already received part of the benefits provided for by the new policy) of whom 775 were bartender and culinary personnel.

[10]This policy provided for 10 days' pay for 1 or more years' service; 15 days for 2 or more years; and 20 days for 6 or more years. Respondent's new policy which was dated August 28, 1974, and made effective July 1, 1974, granted the same benefits.

c. *Holiday benefits*

In May 1974, Respondent was negotiating with the Painters Union. The Painters requested eight paid holidays instead of seven. Dougall, who was participating in those negotiations, studied the holiday policies in effect throughout the hotel and found that the purchasing area and warehouse were getting four holidays, the administrative area seven, and the bar and culinary workers four.

In June 1974, Valentine told Dougall that they were going to have to do something to remain competitive in obtaining employees. She told him that Harrah's was already paying eight holidays and that Harvey's was instituting a plan with eight paid holidays and overtime after 40 hours a week.

Respondent raised the number of holidays from four to seven on August 29, 1974, and made if effective September 1, 1974. The change in policy affected 1,788 persons employed by Respondent, of whom 648 were bar and culinary personnel.

d. *Meal benefits*

In late April or early May 1974, Dougall met with Valentine and Assistant General Manager Atchley and they discussed Respondent's policy with regard to furnishing the employees meals. Dougall ascertained that there was a very erratic policy, with some classifications of employees getting all their meals free while others were receiving no meals.[11] He also found out that different categories of employees ate at different locations. At that time Dougall decided to try to provide meals for all the employees and to furnish a central

[11]Cocktail waitresses and bartenders were allowed to buy 60-cent meal tickets.

location where they could eat. The existing employees' cafeteria could not handle all the employees. He decided to refurbish the employees' cafeteria so that it could accommodate all the employees and to provide meal benefits when the cafeteria was completed. He ordered material for the cafeteria in June and July 1974, but the construction was not completed until about September 1, 1974. Before the completion of the cafeteria, Valentine once again told Dougall of the problem of obtaining employees and said that it might be more competitive to give the employee a free meal rather than an increase in pay. On August 29, 1974, the new meal policy was announced to employees and made effective September 1, 1974. That policy affected 1,040 persons employed by Respondent, of whom 154 were bar and culinary personnel.

e. *Disability insurance*

In May 1974, Dougall spoke to Hinkle, the president of Del Webb Hotels International, about the problem created by the variation in fringe benefits throughout the hotel system. He requested permission to investigate the possibility of such benefits as disability insurance and dental care. Hinkle told him to go ahead and investigate the cost. Dougall then requested Valentine to obtain cost estimates for various programs and in July he relayed the information to Hinkle. Valentine had recommended to Dougall that an income protection plan (disability insurance) be obtained. Both Harrah's and Harvey's had existing disability insurance plans. A disability plan was announced on November 18, 1974, and made effective as of November 1, 1974. It covered 1,634 persons employed by Respondent, of whom 625 were bar and culinary personnel.

f. *Dental and vision insurance*

During the negotiations with the Painters in May 1974, Dougall discussed with Hinkle the possibility of making changes in fringe benefit plans. In June 1974, they discussed the possibility of including Respondent's employees in a dental and vision insurance plan which covered certain employees in Las Vegas through the Nevada Resort Association. Hinkle was a trustee of that plan. Hinkle said that he would see what he could do about lumping Respondent's employees into that plan. Hinkle was successful in that effort, and the employees were notified on August 27, 1974, that the plan was effective as of September 1, 1974. Prior to that time, Harrah's had also decided to establish a dental and vision plan. Harrah's plan went into effect in November 1974. Respondent's dental and vision insurance covered 1725 persons employed by Respondent, of whom 648 were bar and culinary personnel.[12]

3. The union activity

A detailed analysis of the union activity that took place at Respondent's premises is set forth in subsequent sections. The pertinent matters can be briefly stated. Respondent's bar and culinary employees were covered for many years under a multi-employer collective-bargaining contract to which Respondent and the Union

[12]As the improvement in the group medical insurance plan was not alleged as a violation of the Act, the background of that change is not fully set forth. However, in brief, during the summer of 1974, Valentine found that the competitors' group medical insurance plan had better major medical benefits than Respondent's and the employees were notified on October 17, 1974, that effective November 1, 1974, Respondent's plan was enlarged. That change affected 1,723 persons employed by Respondent, of whom 648 were bar and culinary personnel.

were parties. Until June 1974, the Union was something less than vigorous in policing the contract or in making its presence known at Respondent's facility. In early June 1974, representatives of Respondent attended a meeting of the Association in Reno in which they were told that the Union was going to be put under a trusteeship and a major effort was going to be made to strengthen union membership. The trusteeship was imposed on the Union on June 7, 1974. Shortly thereafter, the Union began to become extemely active with relation to Respondent. A number of union business representatives came on to Respondent's premises and spoke to employees. The employees themselves spoke about the Union to each other and to supervisors. There were discussions concerning what demands were to be made at the anticipated contract negotiations. In general, the Union assumed a much more active role than it had in the past, and Respondent was aware of that change in direction. The first improvement in fringe benefits was announced on August 27, 1974, and, as set forth above, a number of other benefits were granted to employees during the summer and fall of 1974. Though a number of wage increases had been granted during the period of the last contract, pursuant to Respondent's right to do so as set forth in the contract, there had been no prior increases in fringe benefits during that period.

On August 30, 1974, Respondent issued a newsletter to all employees in which it stated ". . . we are not required to agree to any of the demands made by the Union during those negotiations." However, when the newsletter is read as a whole, it does not appear to be an attempt to contrast the new fringe benefits with what the Union could do for the em-

ployees. Instead, it appears to be an attempt by the Respondent to counter what it believed to be promises made by the Union to employees. The newsletter states in part:

> The Union is also promising employees that they will receive the benefits contained in the Las Vegas Culinary contract or that the conditions of employement contained in that contract will be applicable here. Remember, the Hotel already has two contracts with Local 86 and only the terms and conditions contained in those agreements are binding in this hotel. When those contracts expire, we will sit down and negotiate with the Union in good faith as required by Law if the union represents a majority of our employees. Everything is negotiable; however, we are not required to agree to any of the demands made by the Union during the negotiations.[13]

[13]The newsletter also states:

> As I am sure most of you are aware, there has been a substantial increase in union activity here at the Lake and within many of the hotels including the Sahara Tahoe. Most of this activity seems to have been generated by the Hotel-Motel-Restaurant Employees and Bartenders Union Local No. 86 and the fact that Mr. Bramlet, an International trustee for the Local Union, has appeared on the scene.
>
> A number of our employees have asked members of management what our position is and why we have not taken some action to make our position known. The plain and simple reason we have not is because we are precluded by law from doing so. Local Union No. 86 is already the collective bargaining representative and has been for some time for employees in our bar and culinary operations as well as our hotel service and housekeeping departments. Neither the law or the contracts signed by Local 86 and the hotel require you to become a member of that Union. However, as long as a majority of our employees want to be represented by the Union we must continue to recognize the Union and the hotel cannot take any affirmative steps to interfere with or destroy the majority status of the Union. In plain and simple language, the hotel is precluded by law from taking sides.

4. Analysis and conclusions with regard to the changes in benefits

a. *The alleged violations of Section 8(a)(1) relating to benefits*

Paragraph VI(a) and (b) of the complaint allege that Respondent announced and granted improved or new benefits relating to vacation, holdiay, meals, and disability insurance in order to induce employees to abandon their support for the Union. The matters set forth in that paragraph are alleged in the conclusionary portions of the complaint as constituting a violation of Section 8(a)(1) of the Act. Other sections of the complaint deal with unilateral changes in benefits that are alleged to be in violation of Respondent's duty to bargain and therefore of Section 8(a)(5) of the Act. The only issue presented by paragraph VI of the complaint is whether the benefits were granted "in order to induce employees to abandon their support for the Union."

The benefits were granted at a time when the Union was extremely active with regard to Respondent's employees. The changes were granted while a collective-bargaining agreement was in effect, and both before and after September 27, 1974, when Respondent filed a petition for an election. The paragraph of the complaint under consideration does not allege that the existence of the contract barred a lawful granting of the benefits. However, even if the benefits were permitted by the contract, Respondent could not grant them

if the benefits were made in order to induce employees to abandon their support for the Union.

The benefits were granted at a time when the Union was extremely active with regard to Respondent's employees. The changes were granted while a collective-bargaining agreement was in effect, and both before and after September 27, 1974, when Respondent filed a petition for an election. The paragraph of the complaint under consideration does not allege that the existence of the contract barred a lawful granting of the benefits. However, even if the benefits were permitted by the contract, Respondent could not grant them if the benefits were made in order to induce employees to abandon their support for the Union.

Dougall became general manager for Respondent in February 1974. In May or early June 1974, he renewed contracts with the Carpenters and Painters. In late April or early May, he became aware of potential difficulties in staffing for the busy summer season. The background for all the changes in question is set forth in detail above. All the changes bear a reasonable relation to Respondent's legitimate business needs. Though some of the changes did not become effective until after Respondent's busy season ended, they had all been in the planning stages at earlier dates. Throughout the effective period of its collective-bargaining contract, Respondent had granted wage increases pursuant to the terms of the contract. The last of these was effective on August 18, 1974. Viewing the record as a whole, I do not believe that an inference is warranted that Respondent granted the fringe benefits in question in order to undermine the Union. Rather, it appears that managers before Dougall had relied

solely on wage increases to attract and retain employees and that Dougall preferred an approach that balanced wage increases and fringe benefits. There is no indication that Respondent attempted to capitalize on the fringe benefits in an attempt to discourage union membership. In sum, I find that the General Counsel has not established by a preponderance of the credible evidence[14] that Respondent violated the Act as alleged in paragraph VI of the complaint and I shall recommend that that section of the complaint be dismissed.

b. *The alleged violations of Section 8(a)(5) and (1) relating to new benefits*

Paragraphs XV(c) and (d) of the complaint allege that Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act by unilaterally instituting dental, vision care and disability insurance as well as meal benefits without prior notification or consultation with the Union.

Article I, section 6 of the contract which was in effect from December 1, 1971 through November 30, 1974, provided that: "The Employer is granted the right to increase any privileges, benefits or wages provided for by this Agreement."[15] There are no provisions for dental, vision or disability insurance or for meal benefits in that contract. Those benefits were announced and granted to employees by Respondent without any notification to or bargaining with the Union. The General Counsel argues that article I, section 6 of the contract has no application to the grant of benefits set forth in paragraph XV(c) and (d)

[14]In this connection, I have considered the evidence relating to other alleged unfair labor practices as is set forth in detail below.

[15]That provision is quoted in full above.

of the complaint because those benefits were newly created and were not an increase in "benefits . . . provided for by this Agreement."

I believe that the General Counsel's reading of the contract is unduly restrictive. The contract provides for a number of benefits. Anything additional granted to employees is an increase in those benefits. For example, if two benefits are provided in a contract, a third benefit, even if it is entirely new, is an increase in the benefits already provided for by the contract. As the heading of section 6 states: "Employer May Increase Benefits, Privileges and Wages without Prejudice." I do not believe that the contract can be fairly read to mean that the employer could freely raise wages in any amount but was narrowly restricted in the type of benefits it could add.

In addition, the institution of the dental, vision and disability insurance was permitted by another section of the contract. Article II, section 4A of the contract provided:

> The Employer agrees that all employees covered by this Agreement shall be entitled to and shall receive the same insurance benefits provided for the other employees of the Employer working at the establishments and/or locations referred to herein.

All of the insurance benefits granted to the bar and culinary workers were also granted to a large number of other employees working at Respondent's establishment. The contract not only allowed Respondent to grant the same insurance benefits to the bar and culinary employees but required that they be granted.

As all of the benefits mentioned in paragraph XV(c) and (d) of the complaint were permissible under the contract then in force between the Respondent and the Union, I find that the General Counsel has not established by a preponderance of the credible evidence that Respondent refused to bargain by instituting those changes. I shall therefore recommend that paragraph XV(c) and (d) of the complaint be dismissed.

C. *The Allegation that Respondent Violated Section 8(a)(5) and (1) by Unilaterally Changing Conditions of Employment by Prohibiting Union Representatives from Entering the Basement Area*

1. Background

Article I, section 4 of the contract provided:

> Business Representatives of the Union shall be permitted to investigate the standing of employees or job conditions at any time; provided, however, that no interviews shall be held during the rush hours. Such interviews shall not interfere with the employee's service to the customers.

As indicated above, union business representatives spent a substantial amount of time at Respondent's premises during the summer and fall of 1974. That activity resulted in an exchange of correspondence between Respondent and the Union. On September 19, 1974, Dougall on behalf of Respondent wrote a letter to Union Business Representative Tucker which stated in part:

> It has recently come to my attention that union organizers have come on to the premises of the hotel and have been seeking information from supervisors and other employees of the hotel. I realize that under collective bargaining agreements

with your union that business representatives of the union need not seek permission before conducting interviews with employees when "investigating the standing of employees or job conditions." However, it is my feeling that common courtesy would dictate that they make their presence known to management. It is also my feeling that if paid organizers are on the premises soliciting employees to join the union such activity is not in purview of the provision quoted above.

On September 30, 1974, Union International Trustee Bramlet wrote to Dougall with reference to a grievance concerning the Union's claim that security officers were restraining union business representatives from investigating the standing of employees and job conditions.

On October 1, 1974, Respondent's Assistant General Manager Atchley wrote to Bramlet pointing out the existing no-solicitation rule in effect at the hotel and stating in part:

> Obviously, there is a fine line between a business representative conducting legitimate union business and a paid organizer soliciting in violation of the hotel policy. The problem is compounded by the fact that numerous individuals claiming to be business representatives have presented "fill-in" business cards when asked to identify themselves. Since anyone could insert his or her name on such a card we have no sure way of determining who is and who is not a duly authorized business representative. Because of the uncertainty created by the use of these cards, we must decline to recognize them without some prior official communication from the Union identifying the bearer

> of the card as a duly authorized business representative. Another problem is that we know that some of the alleged business representatives are in fact soliciting. In order to determine whether the activities of the business representatives are legitimate we intend to have your representatives accompanied by security guard until we are satisfied as to the purpose of the visit. This is not intended to harass the Union nor do we view it as a violation of the contract.

2. The incident in question

Howard Lawrence is a business representative and the Union's chief executive officer in the Lake Tahoe area. In early October 1974, Lawrence, together with Union Representative Bobby Swan, went to the basement area of Respondent's premises where the employee cafeteria was located. That area is not open to the public. At that time the employees' cafeteria was closed for remodeling and employees were eating at an adjacent employees' lounge. Lawrence credibly testified that he went to that location to inspect working conditions, to receive complaints from employees and to talk to current and potential members of the Union. A uniformed security guard approached the business representatives and asked them if they were employees of Respondent. They identified themselves as business representatives of the Union. The guard told them that the area was limited to employees and that they would have to leave. Lawrence replied that they had been there before without any problem and that they had a right under the contract to be there. The guard replied that they still had to leave. Swan said that they would leave and get

further clarification on the issue. Lawrence and Swan then walked to the elevator where they were met by some security personnel, including John Schott, Respondent's chief of security. Schott asked them whether they were employees and what they were doing there. Lawrence replied that they were business representatives and they were there to talk to employees and inspect working conditions. Schott said that the back area was closed to everyone except employees and that they were "86'd" from there. Lawrence asked what was meant by that and Schott replied that they were not allowed in the back areas, that they could go to the public areas, and that if they did go to the back areas, action would be taken against them. The business agents then left.[16]

Lawrence returned to the hotel a week later and went into the main kitchen area. He went to the chief chef's office but the chief chef was not there. He then spoke to some employees in the kitchen where he was approached by a supervisor who asked him what he was doing there. Lawrence gave the supervisor a business card and said he was there to enforce the contract, see conditions and receive complaints. The supervisor said that it was all right and walked away. Lawrence then went into the employees' lounge

[16]These findings are based on the credited testimony of Lawrence. Schott testified to a somewhat different version of the conversation. He averred that he asked them what they were doing in a nonpublic area; that Lawrence answered that they had a contractual right to be there; that Schott replied that he did not think so and that they were not supposed to be in that area; and that Swan then said that they were going up to see Assistant General Manager Atchley. Schott denied that he said anything about the business agents being 86'd. Lawrence impressed me as an extremely credible witness with an excellent memory. I believe that his recollection of the events was more accurate than that of Schott.

and spoke to other employees concerning new contract proposals. From there he went to the bake shop where he was approached by Joseph Tuoto, Respondent's assistant food and beverage manager. Tuoto asked him what he was doing there and again Lawrence said that he was there to inspect working conditions and receive complaints from employees. Tuoto said that he did not believe that Lawrence had any right to be in that area and that he thought the witness had to have permission from management to be there. Lawrence answered that he had tried to contact the chief chef before going into the kitchen area but the chief chef was not in his office. Lawrence also said that in the past he had talked to the chef and had not had any problems. Lawrence and Tuoto then went into Tuoto's office where a telephone call was placed to Tony Atchley, Respondent's assistant general manager. After completing his telephone call, Tuoto told Lawrence that Lawrence was free to go anywhere in the hotel that he chose but that a security guard was going to accompany him. Lawrence said that the employees would not talk to him freely with the security guard standing by. Tuoto merely repeated that he was free to go anywhere he wanted to but the security guard was going to accompany him. Lawrence then left in the company of a security guard and spoke to some of the employees.

3. Analysis and conclusions

Paragraph XV(a) of the complaint alleges that Respondent unilaterally changed the conditions of employment of its employees by prohibiting union representatives from entering the basement area of its premises for the purpose of investigating the standing of em-

ployees or job conditions as permitted by the contract. The complaint does not allege that Respondent's insistence that a security guard accompany the business representative constituted a violation of the Act. The fourth paragraph of the Fifth Amended Charge alleges that Respondent violated the Act by engaging in surveillance of the Union's business representatives and listening to their conversations with employees. That allegation of the charge was dismissed by the Regional Director for Region 20 of the Board. On appeal to the General Counsel that dismissal was affirmed. In the letter affirming the dismissal, the acting General Counsel stated that the outstanding complaint alleged that the prohibition of business agents from certain areas of the casino violated Section 8(a)(5) of the Act but "the Employer was not deemed to have violated Section 8(a)(1) by initially assigning security guards to follow and observe Union agents on the premises." Respondent, therefore, has clearly been put on notice that the complaint was not intended to allege that a violation was committed when Respondent assigned security guards to follow business representatives and Respondent had no obligation to produce evidence to meet such an allegation.

Business Representatives Lawrence and Swan had the right under the contract to visit the cafeteria area in the basement of Respondent's premises. Lawrence's credited testimony establishes that they visited that area in early October 1974 for purposes that were permitted under the contract. Respondent had adduced no evidence to indicate that they abused their contract rights during that visit. While they were there, a uniformed guard and then Respondent's chief of security, who was a supervisor, told him that he had to leave that

nonpublic area. However, 1 week later, when Lawrence returned to a nonpublic area in the kitchen, the matter of his right to access was brought to the attention of higher management officials. After Tuoto questioned Lawrence's right to be in the kitchen area, the matter was referred to Assistant General Manager Atchley and Lawrence was advised that he could go anywhere in the hotel that he chose. Lawrence was given full access to both public and nonpublic areas. Though Respondent did require a security guard to accompany him, the complaint does not allege that requirement to be a violation of the Act. Initially, security guards did improperly limit the contractual access rights of union business agents. However, a week later a similar incident was brought to the attention of higher management and a clear policy was enunciated that allowed full access rights to the business agents. Under these circumstances, I do not believe that it can fairly be said that Respondent "unilaterally changed the conditions of employment" by prohibiting union representatives from the basement area. It was simply a mistake in applying company policy by the security force which was quickly corrected by higher officials. I shall therefore recommend that paragraph XV(a) of the complaint be dismissed.

D. *The Layoff of Dolly Smith*

1. The circumstances of Smith's hire, union activity and layoff

Dolly Smith worked for Respondent as a cocktail waitress from 1970 to about April 1973, when she voluntarily left for personal reasons. During the first few years of that employment, she was a member of the Union, but before she left Respondent's employ

she dropped out of the Union by neglecting to pay her dues. Smith was reemployed for a short time in 1973 and then she once again voluntarily left. She was reemployed for a third time as a cocktail waitress on October 11, 1974. On November 17, 1974, she was laid off. That layoff is alleged in the complaint as a violation of Section 8(a)(3) and (1) of the Act.

On about September 28, 1974, some weeks before her last hire, Smith went to Respondent's premises to visit friends. At that time she was living in Las Vegas. While she was at the Casino, she spoke to Respondent's General Manager William Dougall. Though Dougall had only been general manager since February 1974, he knew Smith from her prior employment there. Dougall asked her where she was living and she replied that she was living in Las Vegas and that she would like to come back to Lake Tahoe. He asked her if she had tried getting a job in Las Vegas and she answered that it was a slow time of year and there were a lot of people out of work. She also said that she would like to come back to Lake Tahoe if she could get a job. Dougall then told her that she could have the next available job as a cocktail waitress.[17]

[17]These findings are based on the credited testimony of Dougall. Smith's testimony concerning that conversation was somewhat different. She averred that Dougall asked her if she was coming back to the Lake; that she said that she would like to if she had a job; and that he replied: "if you want, you tell them that I said to give you the first available job. If I can do anything to help you, I will, and you don't have to be worried, you always have a job with us." She also averred that he told her to speak to Joe Tuoto, the bar manager. Dougall impressed me as a forthright and candid witness with a good memory for detail. My observation of Smith as she testified and her testimony read as a whole, led me to the conclusion that even when she was trying to be candid, she had a tendency to exaggerate and had difficulty in distinguishing between what she wanted to hear and what was in fact said. As between Dougall and Smith, I credit Dougall.

The same day, Smith spoke to Joseph Tuoto, the assistant food and beverage manager. She told Tuoto that Dougall had said that he (Dougall) was in favor of her coming back to work if they had a job opening. Tuoto said that there would be no problem and that he would check on it and put her on the schedule.[18]

On October 8, 1974, Smith filled out a written application for employment and on October 11 she began work. She was assigned to work in the gambling area (called the pits) on the day shift with Sundays, Mondays and Tuesdays off. That was the work area, shift and scheduling she had requested. The pit area was considered particularly desirable because the largest tips (called tokes) were received there. Before she was employed, Tuoto checked with Assistant General Manager Atchley to see if there was any reason Smith should not be reemployed. Respondent's standard practice is to make such inquiries concerning rehires. Atchley told Tuoto that she was eligible for rehire.

Respondent's prime business season is June through September. However, because a large number of employees return to college each fall, there are generally not many layoffs until late October or November and the need for employees depends on such factors as what entertainment is being offered and how busy

[18]These findings are based on the credited testimony of Smith. Tuoto in his testimony denied that Smith said anything about a prior conversation she had with Dougall. Dougall had promised Smith the next available job and it is most improbable that Smith would have refrained from mentioning that to Tuoto. I therefore do not credit Tuoto in that regard.

the hotel expects to be at a particular time. Elvis Presley was scheduled to start a 4-day engagement on October 11, 1974, and Presley usually drew extremely large crowds. Respondent expected to be busy about that time. Beverage Manager James Wilcox was the supervisor who actually signed Smith's hire papers. He credibly testified that Smith was a good cocktail waitress and she was assigned to the pits because she was well qualified. Respondent's records show that 11 cocktail waitresses were hired between September 11 and 29, 1974, and that one was hired as late as November 15, 1974. In general, the number of cocktail waitresses varied from about 50 to 85.

Shortly after she was reemployed on October 11, 1974, Smith rejoined the Union and became active on its behalf. Those activities took place both on and off Respondent's premises.

In late October, Smith attended a Halloween party at the home of one of the cocktail waitresses. She brought Union Business Agents Howard Lawrence, Bobby Swan and Audrey Hewitt with her. About half of the employees in the bar department attended the party. She introduced Lawrence and Swan to the employees as union representatives and said that they could answer questions. She also told the employees that the Union was giving a party at an establishment called the Snowshoe and that they were all invited to discuss the Union and sign if they wanted to. That party was held and some of the employees came. After the party, Smith went to Respondent's premises with Howard Lawrence and they had some drinks at the bar. At that time she introduced Lawrence to cocktail waitresses and to some of the pit bosses. The pit

bosses are supervisors who watch over the dealers at the gambling tables. She also introduced Lawrence to Joe Scalise, the assistant bar manager. Thereafter, while she was working, she had numerous conversations with Pit Bosses Bud Rains, Loyle Borden and Elio Martini. Even though they were supervisors, she spoke to them because she thought they were her friends. She told them that she was trying to help sign up people for the Union.[19]

Smith also spoke to a number of employees about the Union while she was working. One day in the early part of November, Smith spent between 11 a.m. and 7 p.m. in an employees' lounge on Respondent's premises. During that time she signed up 10 or 15 employees for the Union. While she was there, supervisors came in and out of the employees' lounge. In the lounge she also handed out about a hundred invitations to a party that the Union was to hold on November 12, 1974. She told the employees that a union representative was going to be there to answer their questions, to sign up those who wanted to join and to take contract proposals. She also handed out invitations in the hotel when she was off shift. A day or 2 before the November 12, 1974 party, Tom Robinson, a bar stock supervisor, told her he heard there was going to be a party and asked why they weren't invited. She said that they were welcome to

[19]This finding is based on the credited testimony of Smith. Rains, Borden and Martini, in their testimony, all denied such conversations. Though I have some reservations as to whether Smith was always candid, I was totally unimpressed with the testimony of those three pit bosses. Their demeanor as well as their testimony convinced me that they were more concerned with not becoming involved with the situation than they were with truthfully testifying concerning events they observed.

come if they wanted to and that it was for everyone. Robinson did not come to the party but afterward he asked Smith how the party went. The party was held on November 12, 1974, and 35 or 40 employees went to it.

On November 13, 1974, Smith was sitting with another cocktail waitress in a bar of the hotel. The bar manager, Jim Wilcox, was sitting at the bar a few feet away when another cocktail waitress called across the room asking whether she could give Smith her initiation fees. Smith motioned for her to be quiet because Wilcox was sitting there.

On November 14, 1974, Respondent held a boxing match in its High Sierra Theater. Before the fight, Smith had received some complimentary tickets from the fight promoter, Bill Miller. Smith arranged to attend the fight with Union Business Representative Audrey Hewitt. When Smith went into the High Sierra Theater, she told the maitre d' that Audrey Hewitt and some friends were supposed to meet her and asked that they be shown to her table. A security guard was standing nearby and he asked her whether Hewitt was working for the Union. Smith answered that Hewitt was. Smith then went to her booth, which was a ringside table. Those tables are ordinarily reserved for company executives and important guests. While Smith was at the table waiting for Hewitt, the maitre d' or his assistant told Assistant General Manager Atchley that Smith was a guest of Bill Miller and that Audrey Hewitt was joining Smith. Atchley went to Smith's table and asked her if Hewitt was joining her. When Smith answered in the affirmative, Atchley said that he could not allow that because Hewitt had been ter-

minated from the hotel for violation a no-solicitation policy and he did not want her sitting down in the V.I.P. area as a guest of the hotel. He also told her that if Smith insisted on sitting with Hewitt, he would be happy to move them further back in the room. Smith replied that she would take care of it. Hewitt did not join Smith.[20]

Later that evening after the boxing match, fight promoter Miller was sitting in the Pine Cone Lounge, a bar in Respondent's hotel, with Atchley. Smith came up to them and said that she was sorry if there had been any embarrassment and that she hadn't intended any. Atchley said that Smith had shown bad taste in having Hewitt join her down there but to forget about it. Atchley then left.[21]

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[20]These findings are based on the credited testimony of Atchley. Smith testified that Atchley told her that he did not want any union representative sitting at their best ringside seats, that all of the other employees would see that "bitch" sitting there, and that if Hewitt did sit there, he would have to move them to the back of the room. Atchley impressed me as a very careful, tight-lipped person who would be very circumspect in his conversations with employees.

[21]This finding is based on the credited testimony of Atchley as corroborated by Miller. Smith's version of the conversation was considerably different. She averred that Miller was sitting alone in the bar when she approached him and that Miller said that Atchley had chewed him out for giving her complimentary tickets when the union representative was going with her. She further averred that Atchley then walked over to them and that she told Atchley that she didn't mean to throw anything in his face. According to Smith: Atchley said that all of the bar employees had signed up for the Union; she replied that she didn't think all of them had; he said he did; and he asked her to help him and to tell the employees how crooked the Union was. Atchley denied any such conversation. For the reasons set forth above, I think it most unlikely that Atchley made the remarks attributed to him. I credit his denial.

In an attempt to discredit fight promoter Bill Miller, the General Counsel called Colin McKinley, who is employed by

(This footnote is continued on next page)

On November 17, 1974, Bar Manager Wilcox called Smith into his office. He told her that he had a very unpleasant task to perform and that he was going to have to lay her off as a seasonal layoff. She asked whether it had anything to do with the Union and he replied "Why, are you in the union?" She replied that she was not. He told her it was a seasonal layoff and that he had no choice. He also said that Dougall had gone over the schedule with him, that they had to make room for some of the people on the other shifts, that they had to cut back the number of employees and that they had to go by seniority. Wilcox credibly testified that he was upset when he was talking to Smith because he had only been bar manager for a month and he had not become accustomed to laying off people.[22]

Culinary Workers Local 226. McKinley had been asked by Union Business Representative Lawrence to contact Miller concerning the forthcoming hearing in this matter. McKinley testified that in a telephone conversation Miller said that he heard Atchley tell Smith that he (Atchley) thought Smith had used poor judgment to invite the union organizer to sit with her. Miller averred that in that telephone conversation with McKinley it was McKinley who made a remark about Smith bringing a union organizer and that he told McKinley that Atchley talked about Smith bringing a terminated employee as a guest. I credit Miller's recollection of the conversation.

[22]These findings are based on the credited testimony of Wilcox. Smith corroborated some of Wilcox' testimony but added some additional matters. She averred that Wilcox said that he had been awake all night and he had to do something that was making him sick. She also testified that he said that he didn't want to do it and if there was any way he could get around it he would. She further testified that she asked him why she was told to move back to the Lake if she was going to be laid off; and that he said he couldn't answer, but they were laying off by seniority, she was the last hired and he had to let her go. I believe that Wilcox' version of the conversation was more accurate.

On November 18, 1974, Smith returned to Respondent's premises and spoke to Dougall. Smith was crying. She told Dougall that she had been laid off. He apologized and said there was nothing he could do about it. She told him that the had spent about $1,000 to move her household goods there and she was broke. He replied that he had about $200 in his pocket and that he would give it to her if she needed money. She refused, saying she had too much pride to take it.[23]

Dougall credibly testified that it is not uncommon for him to loan employees money and that when he offered Smith the $200, he though of it as a gift which would hopefully be repaid. He also averred that such loans generally were repaid.[24]

2. Respondent's explanation of the layoff

As is set forth above, Respondent's prime business season is from June to September each year. There are not many layoffs until late October or November

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[23]These findings are based on the credited testimony of Dougall. Smith testified to a somewhat different version of the conversation. She averred: that Dougall said that he was very sorry and she was one of the best cocktail waitresses they had but there was nothing he could do about it; that she asked why she was brought there and juiced into the pit (the witnesses used the word "juice" to mean obtaining or retaining a job because of special influence or patronage) just to be let go; that he replied that it wasn't personal but just business; that she said that it had taken all her money to move and she didn't know what she was going to do; that he offered to help her with money to move back to Las Vegas if she needed it; and that she said she had more pride than that. I credit Dougall's version of the conversation.

[24]In November 1974, Dougall loaned $100 to an employee named Sharon Pareda. On January 29, 1975, he received a letter from her and a repayment of the loan.

because many employees return to college. The number of employees needed depends to some degree on the entertainment that is being offered and the anticipated business for Christmas and other holidays, but in general layoffs continue through the winter period until business picks up for the summer. The employee complement varies from a high of about 2,000 (of whom about 85 are cocktail waitresses) to a low of about 1,500 (of whom about 50 are cocktail waitresses).

In mid-October 1974, performances by Elvis Presley generated a large amount of business for Respondent. About November 1, 1974, Dougall informed his supervisors that they were going to have to cut payroll in all areas. About that time, several employees complained to Dougall that they were not receiving enough work to make ends meet. Dougall then asked his personnel manager, Valentine, to run a survey to see how much time employees were actually getting. He also asked Bar Manager Wilcox to find out how many days the bartenders and cocktail waitresses wanted to work.[25]

On November 15 or 16, 1974, Dougall reviewed with Bar Manager Wilcox the general managers daily report which indicated that labor costs were running approximately 2 percent more, with relation to total sales, than they had the prior year. Dougall pointed out that hardly anyone in the bar was getting a full 80 hours in a 2-week period, that fringe benefits cost approximately 50 percent of salary, and that they had to try to work all the bar employees on a 40-hour basis were possible in order to avoid fringe benefit

[25]During that time of the year, some of those employees wanted to work less days so that they could participate in winter sports.

costs for an additional number of employees. After discussing the matter, they decided that they had to cut at least three cocktail waitresses and two bar men. There was no mention of the names of the people who were to be laid off. Dougall told Wilcox that they would have to go by seniority.[26]

Shortly before the November 17, 1974 layoff, Wilcox went over the names of employees who might be laid off. Before then, cocktail waitress I. M. Brown and a bartender named Sabella had given notice that they were leaving. Wilcox therefore only needed three other employees for the layoff. Cocktail waitresses Smith and J. M. Brown as well as bartender Farmazini were selected and laid off on November 17, 1974. They were selected on a basis of seniority.[27]

Personnel Director Valentine credibly testified that seniority is the basis for layoffs and that efficiency and proficiency are considered only in very specialized jobs. Dougall had outstanding instructions with her that she was to monitor all layoffs and notify him if seniority was not followed. In applying seniority, an employee's last date of employment is considered the hire date whether or not that employee had previously worked for Respondent.

A substantial portion of the transcript in this proceeding as well as a number of exhibits received in evidence relate to the question of whether Respondent did, in

[26]These findings are based on the credited testimony of Dougall and Wilcox.

[27]J. M. Brown was hired on November 15, 1974, and it is not clear from the record whether she was hired the day before or the same day that Dougall and Wilcox discussed the need for layoff. However, she was laid off November 17, 1974, 2 days after her hire.

fact, use seniority for determining layoffs throughout its premises. Valentine was examined and cross-examined at great length on that issue, and voluminous company records were inspected by all counsel concerning Respondent's practices. She testified that in all the reductions in force, none of the waitresses who were less senior were retained over senior waitresses. Records relating to layoffs from the beginning of September 1974 to the date of the trial were particularly reviewed, and she testified that seniority was uniformly applied. The General Counsel and Charging Party cross-examined Valentine with regard to a large number of individual cases and where arguable discrepancies appeared, Valentine gave rational explanations that were consistent with her claim that the basic principle of seniority was followed. After carefully evaluating her testimony and reviewing the records in question, I credit Valentine and find that Respondent did use seniority as a basis for determining who was to be laid off.

3. Analysis and conclusions

General Counsel impliedly makes the contention that Smith was a "juice" hire in that she was hired because of special influence she had with Dougall; that she was assigned to the financially desirable pit area because of the same reason; and that because of that special influence she would not have been subject to seasonal layoff based on seniority but for the fact she was active in the Union. Some of the underpinnings of that argument have not been established by the evidence. The credited evidence indicates that she was hired because Respondent needed an experienced cocktail waitress at the time and her past work with Respondent showed that she was qualified for

the job. The credited evidence further indicates that she was assigned to the pit area because she was needed there. Furthermore, the credited evidence establishes that seniority was uniformly applied during the winter layoffs. Dougall credibly testified that he detests the "juice hire" parctice and that he prohibits it at the hotel.

Shortly after she was hired for her last period of employment, Smith joined the Union and became extremely active on its behalf. She introduced business representatives to the employees and supervisors. She solicited union authorization cards in an employees' lounge on Respondent's premises under circumstances where she could be easily observed by supervisors. An employee asked her about paying initiation fees in a situation where a supervisor could overhear the remark. She told three pit boss supervisors of her activity, and a matter of days before her discharge, Assistant General Manager Atchley knew she was on a friendly enough footing with Business Representative Hewitt for her to invite Hewitt to sit with her at a ringside table during a boxing match in the High Sierra Room. There is direct credited testimony that Respondent knew of Smith's union activity.[28]

Though the General Counsel has established by credible evidence that Smith was active on behalf of the Union, and that Respondent knew of that activity, there is some question of whether the General Counsel

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[28]As there is direct evidence of knowledge, there is no need to consider whether an inference of knowledge would be appropriate based on Smith's open union activity on the premises under circumstances where supervisors would have an opportunity to observe it. Cf. *Big Three Industry, Inc.*, 192 NLRB 370; *Wiese Plow Welding Co., Inc.*, 123 NLRB 616.

has established by credible evidence that Respondent harbored the type of animosity against the Union that would make it reasonable to believe that Respondent was motivated to lay off Smith because of her union activity. The credited evidence in this case does not establish any independent violations of Section 8(a)(1) of the Act. Respondent did question the Union's majority status and did file a petition for an election. However, under the circumstances set forth below, that action was not sufficient to establish such animus. Respondent did notify its employees that the Union was making promises that the Union could not fulfill, but in total context, I do not believe that can be a basis for finding animus. The thrust of Respondent's communications to its employees was that Respondent intended to remain neutral. In a prior proceeding[29] which involved the same Respondent and Union, the Board adopted an Administrative Law Judge's finding that in July 1974 Respondent engaged in certain violations of the Act. Implicit in that holding was the finding that at that time Respondent was hostile to the Union. However, even if animus can be found through the prior proceedings, the record of this case when considered as a whole does not support the General Counsel's contention that there was a causal connection between Smith's union activity and her layoff.

Respondent has established by credible evidence that Smith was hired because Respondent needed an experienced cocktail waitress; that Respondent relied on normal business considerations in deciding that layoffs were required in November 1974; and that Smith was laid off pursuant to an established, uniformly applied senior-

[29]*Sahara-Tahoe Corporation d/b/a Sahara-Tahoe Hotel,* 216 NLRB No. 184.

ity principle. I shall, therefore, recommend that that part of the complaint which alleges that Smith was laid off in violation of the Act be dismissed.

E. *The Withdrawal of Recognition and Refusal to Bargain*

1. The sequence of events

a. *The initial recognition*

The Respondent opened for business in 1965. Prior to that time, the 1962-1965 contract was between the Union, Local 45,[30] and the Association on behalf of various employers. In the spring of 1965, Dan Basta, who was then secretary-treasurer of the Union, asked Bill Powell, who was then personnel manager of Respondent, whether Respondent would sign an agreement with the Union. Powell said that there would be no problem. In April 1965, Respondent joined the Association and on May 11, 1965, Clinton G. Knoll, the general manager of the Association, wrote to the Union,[31] advising it that Respondent had authorized the Association to represent it in labor relations matters pertaining to bartenders and culinary workers. The letter stated in part:

> At the time when the Sahara-Tahoe Hotel, Stateline, Nevada employs bartenders and culinary workers, the hotel shall become a party to the Agreement commonly known as the Agreement

[30]In 1968, there was a merger between the Union (Local 86), which had represented bartenders, and Local 45 of the Culinary Workers in which the Union acquired the assets and responsibilities of Local 45 and assumed jurisdiction of both bartenders and culinary employees.

[31]Identical letters were sent to both Local 45 and Local 86.

between the Reno Employers Council and the Lake Tahoe Area employers (Wagon Wheel and Nevada Lodge).

That contract ran from November 1962 through November 30, 1965, and covered "all employees employed by the employer in its bar and culinary operations at Lake Tahoe in the classifications specifically listed herein." The classifications specified in the contract were those ordinarily associated with bar and culinary workers. Near the end of the 1962-1965 contract, when Respondent employed bar and culinary employees, it became bound by that agreement. Respondent continued to be bound by successive collective-bargaining agreements through the last contract which was effective from December 1, 1971 through November 30, 1974. That contract covered the same classifications of employees. It was executed by the Association and by six[32] members of the Association, including Respondent.

b. *The Reno meeting, the conversation with Tucker and the assignment of business representatives*

In mid-May 1974, Respondent's General Manager Dougall received a notice of a meeting scheduled by the Association in Reno. He sent Assistant General Manager Atchley and Personnel Director Valentine to attend that meeting which was held in early June 1974. At the meeting, Clinton Knoll, the manager of the Association, told the members that the Union was in the process of declaring financial insolvency, that he understood that Al Bramlet was being appointed trustee of the Union, that there was a possibility of a merger of the Las Vegas and Reno locals, and

[32]This number counts Harvey's Resort Hotel and Harvey's Inn separately.

that he understood that business representatives from the Las Vegas local were trying to strengthen membership in the northern Nevada local. Atchley related that information to Dougall.

On June 7, 1974, a trusteeship was imposed on the Union.

About June 10 or 15, 1974, Tucker (who was secretary-treasurer and business manager of the Union before the trusteeship was imposed), at his request, met with Dougall. Tucker said that he was having complaints from waiters to the effect that Respondent was paying busboys more than waiters. Dougall replied that the waiters received greater gratuities or "tokes" and therefore made more than the busboys. Tucker also said that there were complaints from waitresses that they were not getting their 10-minute breaks and 40-minute lunches. Dougall replied that a schedule had been posted but that it was difficult to see that the breaks were taken because some of the employees wanted to make "tokes" during those periods. He said that he would do his best to get the employees to take the breaks. Dougall then asked Tucker what Tucker's position would be if a merger took place and Bramlet was appointed trustee. Tucker replied that he did not know but that Bramlet had brought in a considerable number of organizers who were making more money than he was and that he wasn't sure what was going to happen to his position. Tucker also said that he could not understand because his relationship with the employer had been good and there had always been cooperation between management and the Union. At that point Tucker said that Dougall could help him if Dougall would allow him to set

up a union table in front of the cafeteria.[33] Tucker said that he wanted the table to try to solicit new members and to talk to people. Dougall replied that he could not provide the table because it would violate Respondent's no-solicitation rule.[34]

In early June 1974, Union Business Representative Bobby Swan was assigned to work on behalf of the Union at Respondent's premises. On June 15, 1975, Business Representative Howard Lawrence joined Swan.[35] In August 1975, Business Representative Bob Hart was also assigned to work in the area. On September 1, 1975, Business Representative Frank Meranto was assigned to Respondent's premises as well as to other places and Bob Hart was taken out of Respondent's premises. In mid-September, Audrey Hewitt was assigned to work at Respondent's premises as well as other places. In the first part of October, another business representative worked in the area for about 2 weeks.

c. *The reports to Dougall*

Beginning about the 3rd week in June 1974, a number of union representatives started coming on to Respondent's premises and speaking to employees. Dou-

[33]In the past Respondent had allowed the Union to have a table on its premises at which the Union collected dues. That practice had long since ceased.

[34]These findings are based on the credited testimony of Dougall. Tucker testified that the conversation took place before the trusteeship was imposed on June 7, 1974, that there was no discussion about a union table, and that he did not recall discussing the trusteeship or additional business agents. I was not impressed with Tucker's ability to accurately recall details and I credit Dougall's version of the conversation.

[35]In October 1974, Lawrence was appointed chief executive officer for the Union in the Lake Tahoe area.

gall personally saw some of the representatives on the premises and a number of supervisors and employees made comments to him. Head hostesses Pat Dixon and Silvia Fields spoke to Dougall almost daily and told him that union representatives were in the coffee shop talking to the help. They informed him that union representatives were positioning themselves in the walkway so that waitresses and bus help had to pass and that they were interfering with the employees in those positions. They also told him that employees kept asking them what management's position was with regard to the Union and what would happen if the Union got in. Some employees asked Dougall directly the same questions. Dougall repeatedly told both the supervisors and the employees that management had no position, that there was a contract in effect and that Respondent had to keep its hands off. Some employees asked Dougall whether they had to join the Union. Dougall responded that management was neutral and was not going to interfere with their decision to join or not join.[36]

About the 2nd week in August, some of the waiters and waitresses requested a meeting with Dougall. About 10 or 12 employees gathered together and asked Dougall what management's position was on the Union. He told them that management was neutral.

Dougall received reports from a number of his supervisors. Bar Manager Tuoto told Assistant General Man-

[36]Dougall testified that many individual employees asked him questions regarding the Union. However, he could only recall specific conversations with about a half dozen particular employees. It is noted that there were from 525 to 750 of Respondent's employees in the bargaining unit. It appears that only a very small percentage of Respondent's employees in the unit spoke to Dougall about the Union.

ager Atchley that business representatives were questioning employees at their work stations and disrupting their work. Atchley received similar reports from Executive Chef Helfenstein and Maitre d' Mormando. Mormando told Atchley that business representatives were approaching his employees and asking them whether they were members of the Union while they were working. A number of head hostesses reported to Atchley that business representatives had approached their employees while they were working. Atchley informed Dougall of all these reports. During the summer of 1974, Atchley collected business cards from a number of union business representatives who were at Respondent's premises. He also told Dougall that employees had approached a number of supervisors asking whether they had to join the Union.

d. *The Union's activity prior to June 1974*

The Union became extremely active on Respondent's premises beginning in the latter part of June 1974. When the Union became active, management officials told Dougall that before that time they had never received visits from union representatives or any complaints from the Union of any kind. In fact, the Union had maintained an extremely low profile in its dealings with Respondent before June 1974. From 1965, when Respondent entered contractual relations with the Union, until the union activity began in June 1974, the Union had never filed a written grievance. Two grievances were filed on behalf of employees on July 18, 1974. Two others were filed thereafter.

The questions by employees to supervisors concerning what would happen if the Union came in gave cause for Respondent to believe that at least some employees

didn't even know that the Union was their representative.

Robert Vickney, who was business agent for the Union from 1970 through 1972, testified that he visited Respondent's premises twice a week. He averred, however, that the only thing he really did was collect dues and go visit people he knew. He recalled only two incidents relating to the administration of the contract. The first was in 1971, when he complained that the barboys were pouring liquor when they weren't supposed to. He discussed that with the bar manager who said that it wouldn't happen again. The second incident was in the spring of 1971 when he spoke to a management official concerning the termination of an employee. The official showed him a film concerning that incident and Vickney agreed that the firing was justified. He never filed any written grievance.

Tucker, who was manager of the Union before the trusteeship was imposed, also testified as to his activities in policing the contracts. He presented an oral grievance concerning the quality of meals provided to employees to then General Manager Hundley. He could not recall whether that occurred before or after the 1971 negotiations. Hundley said that Respondent would look into it. Tucker did not hear anything more about it and assumed that it was taken care of. Tucker also testified that on some unknown date he discussed an employee's discharge with the bar manager but that the manager gave a reason for discharging the employee that satisfied Tucker. A third incident occurred sometime in 1970 when he spoke to the bar manager about barboys tending bar without being paid for it. Tucker averred that the matter was taken care of and barboys were

paid bartenders wages. The last incident that Tucker testified to occurred sometime in 1971 or 1972 when he spoke to Hundley about the difference between porter's and janitor's duties. Tucker averred that nothing was settled concerning that matter.

Perhaps it can be argued that from 1965, when Respondent recognized the Union, until the trusteeship was imposed on the Union on June 7, 1975, Respondent was such a model employer that there was no need for the Union to vigorously take action to enforce its contract or to file grievances. In any event, there is no contention that the Union ever abandoned its status as collective-bargaining agent of the employees. The record does, however, establish that during that time the Union's contacts with Respondent were extremely limited.

e. *The newspaper reports, Dougall's actions and the conversations with Attorney Oliver*

On August 22, 1974, Dougall read two articles concerning the Union in local newspapers. Both reported on interviews with Al Bramlet, the Union's International trustee. The report in the State Journal for August 22, 1974, stated in part:

> Southern Nevada labor leader, Al Bramlett, said Wednesday membership in Northern Nevada's Culinary Union has doubled in 2½ months as part of a full-scale campaign to organize Reno and Lake Tahoe food and beverage workers.
>
> Bramlett, recently named international trustee for the Local 86, which serves the Reno-Tahoe area, said dues paying members have grown from about 900 to more then 1,800 since May.

> He said he was sent north because the conditions in the Reno-Tahoe area are "archiac" compared with Las Vegas.
>
> * * *
>
> Bramlett said the big difference is that Las Vegas is 90 percent unionized while Reno-Tahoe is less than 20 percent.

In the article in the Evening Gazette dated August 22, 1974, Bramlet was quoted as saying he was brought in "to organize the unorganized" and that the Culinary Union currently represented only about 1,800 of some 10,000 eligible workers in northern Nevada.

Dougall was aware of the union activity taking place on Respondent's premises and after reading the articles he called his attorney, Anthony Oliver, Jr., and asked if there was any way they could verify what was said in the newspapers. As result of this call, he obtained certain LM-2 forms which were filed by the Union with the U. S. Department of Labor. By dividing the Union's income as reported on those forms by the amount of dues paid per employee per year, Dougall came to the conclusion that the Union had between 1,000 and 1,800 dues paying members.

Dougall also asked Oliver whether Respondent could poll the employees to see how many of them belonged to the Union. Oliver answered in the negative.

Shortly after reading the newspaper articles, Dougall asked his personnel director, Valentine, to check the employee turnover. She reported to him that there was about a 300 percent turnover per year. Valentine gave Dougall a list showing the number of employees who were employed in 1971 who were still employed in late 1974. There were only 85 or 95 employees

who were employed in September 1971 who were still employed. Valentine told him that there had never been a vote of the employees before recognition and that the Union was not certified.

Dougall asked Valentine to check the number of active contracts the Union had with other employers. She made inquiries and reported back to him that there were about 22 employers and a total of about 4,700 employees who were covered by the contracts.[37]

On August 22, 1974, Respondent's attorney, Oliver, had a telephone conversation with former General Manager Hundley. Hundley told him that during the 1971 negotiations, Union Official Tucker asked for assistance from the employers in keeping new members and also discussed the possibility of a table for collecting dues and signing up members. Oliver reported the conversation to Dougall.

Oliver also reported to Dougall a conversation that he (Oliver) had on August 22, 1974, with an agent of the Regional Office of the Board. The agent was at the time investigating another charge against Respondent. Oliver told Dougall that the agent asked when Respondent was going to file a petition for an election for the food and beverage employees, and that the agent said that it was common knowledge that the Union did not represent 20 percent of the employees of any employer at the Lake.[38]

[37]Her inquiries indicated that there were four other employers covered by the contract with the Union that was binding on Respondent and the total number of food and beverage employees covered under that contract was in excess of 1,423.

[38]These findings are based on the uncontradicted testimony of Oliver and Dougall. Oliver initially testified that he told Dougall that the agent had told him that it was common knowledge the Union didn't represent 20 percent of the employees of the employers at the Lake. He later corrected that testimony and asserted that it was 20 percent of the employees of any employer at the Lake. I believe that Oliver was a fully credible witness and I credit his correction.

About mid-August 1974, Dougall spoke to Ron Wood, a business agent of the Operating Engineers Union. Respondent had a contract with that union. Wood asked Dougall what Respondent's position was with regard to the Culinary Workers' Union. Dougall replied that Respondent expected to negotiate with them and that the contract expired on November 30, 1974. Wood asked what would happen if there were a strike and whether the no-strike clause in the Operating Engineers' contract would be enforced. Dougall replied that he expected Wood to honor the contract and to continue to work. Dougall also said that Respondent might file a petition for an election and that he wasn't certain at that time what his lawyer would advise. Wood replied that it was common knowledge that the Union did not represent over 5 percent of the employees, that the Union would not allow a vote, and that the Union would continue to put blocking charges in the way of a vote.[39]

f. *The withdrawal of recognition*

The latest collective-bargaining agreement expired by its terms on November 30, 1974. On July 22, 1974, the Union wrote to Respondent notifying it of

[39]On November 11, 1974, Respondent and the Union held a grievance meeting. Union Attorney Bowe and Respondent's Attorney Oliver were present. During that meeting, Oliver said that Respondent had filed a petition for an election, that there were some blocking charges, and that he thought that an election would be the best way to resolve the problem. Bowe replied that he would not agree to an election, that they would continue to file blocking charges, and that they would probably never get an election. Bowe also said that the Union had picked Respondent as the prime target.

its desire to modify the contract for the period following November 30, 1974, and requesting that arrangements be made for collective-bargaining negotiations. On August 2, 1974, Respondent timely withdrew its membership from the Association.[40] On August 5, 1974, Dougall wrote to International Trustee Al Bramlet acknowledging receipt of the Union's July 22, 1974 letter. Dougall's letter stated that Respondent had withdrawn from the Association and that the Association no longer represented it for collective-bargaining purposes. The letter further notified the Union that "Negotiations for labor contracts will be conducted directly by the corporation or by some other designated representative."[41] On October 18, 1974, Union Attorney Bowe wrote to Dougall, demanding that a meeting be set for negotiations.

Dougall testified that in mid-September 1974, he made the determination that the Union did not represent a majority of the employees in the bargaining unit. He averred that he made that decision based on the information he had received which is discussed in detail above. At that time Dougall requested Union Attorney Oliver to file a petition for an election with the Board. The petition was filed on September 27, 1974. The election was sought in a single employer unit consisting of Respondent's employees in its bar and culinary

[40]The General Counsel admits in its complaint that the withdrawal was timely. Dougall testified that Respondent withdrew from the Association because Respondent had just negotiated contracts with the Carpenters' and Painters' Unions without the participation of the Association and that he thought that Respondent's staff could handle the negotiations with the Union.

[41]By letter dated September 19, 1974, Association General Manager Knoll notified the Union that the Association was not authorized to represent any of the signatories to the Lake Tahoe area agreement for collective-bargaining purposes.

operations. The complaint alleges, the answer admits and I find that the appropriate unit is:

> All employees employed by the Respondent in its bar and culinary operations as its Stateline, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

By letter dated October 29, 1974, Respondent's Attorney Oliver told Union Attorney Bowe:

> With respect to your request to commence negotiations, we seriously doubt that you represent the majority of the hotel's culinary and bar employees. In order to resolve the question we filed an RM petition. Certainly an election is the most expeditious method of determining the desires of the employees in this regard and we assumed that the Union would welcome such an opportunity to establish its claim to majority status.

Since that time Respondent has continued in its refusal to bargain concerning a new contract. Respondent did, however, maintain the contract and deal with the Union concerning grievances during the contract term.

2. Analysis and conclusions relating to the withdrawal of recognition

a. *The presumption of majority*

As the Board held in *Walter E. Heyman d/b/a Stanwood Thriftmart*, 216 NLRB No. 154:

> A contract, lawful on its face, raises a presumption that the contracting union was the majority representative at the time the contract was executed, during the life of the contract, and thereafter.[2]

[2]*Shamrock Diary, Inc.*, 119 NLRB 998, 1002 (1957), and 124 NLRB 494, 495-496 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

The legality of the Union's initial recognition by Respondent is not subject to attack in this case. In *Stanwood Thriftmart*, the Board said:

> The Board has held that events time-barred by the limitations provision of Section 10(b) of the Act may not be used to overcome the presumption of majority status raised by a contract valid on its face. The contract contains a clause which recognized the Union as majority representative and a lawful union-security clause. The legality of the Union's initial recognition by Respondent was precluded by Section 10(b) of the Act from being attacked at the time of Respondent's termination of the contract and withdrawal of recognition from the Union. Therefore, we find that Respondent may not defend its refusal to continue to recognize and bargain with the Union by an attack on its initial recognition of the Union. [Footnote omitted.]

In the instant case, the presumption of continued majority status is based on a contract in a multi-employer bargaining unit. The complaint alleges a refusal to bargain in a single-employer bargaining unit. A serious question is presented whether the presumption of continued majority which flowed from the existence of the multi-employer contract survived the withdrawal of Respondent from the multi-employer unit and can be applied to the newly-created single-employer unit. There has never been any contract between Respondent and the Union in the single-employer unit and, therefore, any presumption of majority must flow from Respondent's inclusion and in the multi-employer contract that expired on November 30, 1974.

In *Downtown Bakery Corp.*, 139 NLRB 1352, enf. den. in pert. part 330 F.2d 921 (C.A. 6, 1964), a successor employer refused to bargain with a union where that union was the Board-certified representative of the employees in a multi-employer bargaining unit which included a predecessor employer. In that case the predecessor employer had signed a separate collective-bargaining agreement with the union. Relying on a presumption of continued majority, the Board found that that the successor employer violated Section 8(a)(5) of the Act by refusing to bargain with the union in the single-employer unit. The Sixth Circuit Court of Appeals refused to enforce the Board's bargaining order, holding in part that there was not sufficient evidence in the record to support a finding of majority status of the union.

In *The Richard W. Kaase Company*, 141 NLRB 245, enf. den. in pert. part 346 F.2d 24 (C.A. 6, 1965), a similar factual pattern was presented, and the Board followed its *Downtown Bakery Corp.* precedent. In *The Richard W. Kaase Company* case, a union was certified as the collective-bargaining agent of the employees of employers in a multi-employer bargaining unit which included a predecessor employer. That employer executed a separate collective-bargaining agreement. Thereafter, a successor employer continued to recognize the predecessor's contract but later withdrew recognition. The Board found that the successor violated Section 8(a)(5) of the Act. The Sixth Circuit Court of Appeals once again refused to enforce the Board's order, holding: "the ambiguity inherent in the multi-employer election here relied on vitiates its efficacy to prove a majority as to any single employer."

The Board law estabiished by the *Downtown Bakery* and *Richard W. Kaase Company* cases is not directly applicable to the instant situation. In each of those cases, the individual employer had signed separate collective-bargaining contracts with the union and the presumption of continued majority could flow from those contracts rather than from the multi-employer certification. In the instant case, the initial collective-bargaining relationship was in a multi-employer bargaining unit and the contracts to which Respondent was a party were multi-employer bargaining contracts.[42] However, I believe that the presumption of continued majority flowing from the multi-employer contracts requires a derivative presumption of the Union's majority status which is applicable to each of the employer-members of the multi-employer bargaining unit separately. Unless a majority of an employer's employees desire representation by a union, that employer may not lawfully force representation on them by joining a multi-employer bargaining arrangement. *Mohawk Business Machines Corporation*, 116 NLRB 248; *Dancker & Sellew, Inc.*, 140 NLRB 824, enf. 330 F.2d 46 (C.A. 2, 1964). Thus, Respondent would have violated the Act in 1965 when it became party to the multi-employer collective-bargaining agreement if a majority of its employees did not desire representation. Any unfair labor practice charge relating to such a violation would have had to have been filed within 6 months from that time. Respondent may not now either attack the initial bargaining relation or use it to establish a defense to a refusal to bargain complaint.

[42]It is also noted that, unlike the instant situation, both those cases involved conflicting representational claims by rival unions.

As the Board held in *North Bros. Ford, Inc.*, 220 NLRB No. 154:[43]

> Section 10(b) of the Act confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge and has been interpreted by the Supreme Court to bar finding any unfair labor practice, even though committed within that period, which turns on whether or not events outside that period violated the Act. *Bryan Manufacturing Co.*[3] The Court, holding that maintenance and enforcement of a contract more than 6 months after recognition of a minority union did not violate the Act, relied in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relations. Noting that labor legislation traditionally entails compromise, the Court observed
>
> > that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure."[4]
>
> The Board, in light of *Bryan*, has since held that Section 10(b) is applicable to a refusal-

[3]*Local Lodge No. 1424, IAM, ALF-CIO [Bryan Manufacturing Co.] v. N.L.R.B.* 362 U.S. 411 (1960).

[4]*Id. at 428, citations omitted.*

[43]See also *Walter E. Heyman d/b/a Stanwood Thriftmart, supra.*

to-bargain defense that the bargaining relation was unlawfully established.[5]

[5]*Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom, Tragniew, Inc., and Consolidated Hotels of California v. N.L.R.B.*, 470 F.2d 669 (C.A. 9, 1972); *Roman Stone Construction Company, and Kindred Concrete Products, Inc.*, 153 NLRB 659, fn. 3 (1965).

Respondent may not, at this late date, attack either the initial recognition of the Union by Respondent or the initial contract. It cannot defend against the refusal to bargain complaint on the ground that the original contract was entered into at a time when the Union did not represent a majority of the employees of Respondent. Nor can it defend on the ground that the Union did not represent a majority of the employees in the overall multi-employer bargaining unit. That contract must be considered valid on both those grounds. The presumption of majority status which continued over the years based on successive contracts applies both as to the employees of Respondent and to the employees in the multi-employer unit. I therefore find that the General Counsel has properly relied on that presumption to establish the Union's majority in the unit in question. It remains to be considered whether Respondent has successfully rebutted that presumption.

b. *The rebuttal of the presumption*

In *James W. Whitfield d/b/a Cutten Supermarket*, 220 NLRB No. 64, the Board summarized the existing law, holding:

> It is well settled that Section 8(a)(5) and Section 8(d) of the Act require an employer to recognize and bargain in good faith with the bargaining representative selected by a majority of its employees. That recognition establishes a presumption of majority status which, in circumstances such as this, may be rebutted.[6] The employer may lawfully refuse to bargain with the union if it rebuts the presumption by affirmatively establishing that the union has in fact lost its majority status, or shows that it has sufficient objective bases for reasonably doubting the union's continued majority status.[7] To establish sufficient objective bases, however, requires more than the mere assertion thereof based upon the employer's subjective frame of mind.[8] Furthermore, the employer must not have engaged in any conduct tending to encourage employee disaffection from the union.[9]

[6]Cf. *N.L.R.B. v. Frick Company*, 423 F.2d 1327 (C.A. 3, 1970); *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966).

[7]*Celanese Corporation of America*, 95 NLRB 664, 672 (1951); *Peoples Gas System, Inc.*, 214 NLRB No. 141 (1974).

[8]*Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965), enforcement denied 359 F.2d 799 (C.A. 7, 1966); *Automated Business Systems, Inc., a Division of Litton Business Systems, Inc.*, 205 NLRB 532 (1973), enf. denied 497 F.2d 262 (C.A. 6, 1974).

[9]*Peoples Gas System, Inc., supra.*

In *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and its Employer-Members*, 213 NLRB No. 74, the Board held that these principles are equally applicable whether the union was certified by the Board or was recognized without Board certification. In that case, the Board held that the existence of a prior contract, lawful on its face, raised a presumption that the union was the majority representative at the time the contract

was executed and also raised the presumption that the union's majority continued at least through the life of the contract. The Board held that "Following the expiration of the contract . . . the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so. . . ."

The evidence described in detail above falls short of establishing that the Union had, in fact, lost its majority status. On the question of whether Respondent had a sufficient objective basis for reasonably doubting the Union's continued majority status, a detailed evaluation is necessary.

The most recent collective-bargaining agreement to which Respondent was a party was in a multi-employer-bargaining unit consisting of six employers.[44] More than 1,423 employees were covered by that contract. When Respondent refused to negotiate a new contract with the Union, the refusal was keyed to a single-employer bargaining unit containing substantially less than half that number of employees. Though I have found that a presumption of continued majority status existed with regard to Respondent's employees, the fact that the historic bargaining unit had been radically altered cannot be ignored. Respondent's refusal to bargain took place in the context of that disruption of the bargaining pattern and Respondent's claim that it had reasonable doubts as to the Union's majority status must be viewed in light of the overall circumstances.

The Union represented the Respondent's employees since 1965. Yet until the trusteeship was imposed on June 7, 1974, its activities at Respondent's premises

[44]This includes Harvey's Wagon Wheel as a separate employer.

were minimal. Until the trusteeship, no written grievances were filed and the Union's contact with Respondent was extremely limited. It is not the Board's function to evaluate the effectiveness of a union's representation, and inactivity by a union is not in itself sufficient to generate a reasonable doubt as to a union's majority. However, a union's lack of activity is one factor that must be evaluated in determining whether a company has a reasonably based doubt of majority status. Cf. *Taft Broadcasting*, 201 NLRB 801.

After the trusteeship was imposed, the Union became extremely active at Respondent's premises. The Union began a massive organizational drive among Respondent's employees. Respondent knew of that activity. Dolly Smith was openly active in signing up employees on Respondent's premises and told three supervisor pit bosses of that activity. General Counsel's own evidence dealing with the discharge of Smith establishes that Respondent knew of the Union's organizational drive. In addition, a number of reports reached General Manager Dougall indicating such activity and union representatives were often seen on the premises. Nevada is a right-to-work state and the fact that the Union was soliciting membership among Respondent's employees does not establish that the Union lacked majority status. However, the prior lack of union activity coupled with the massive organizational drive did give Respondent some grounds for questioning how many employees were union members.

The imposition of the trusteeship on the Union was an internal union matter and could not be relied on by Respondent to establish whether or not the Union represented a majority of Respondent's employ-

ees. However, Respondent could reasonably assume that the trusteeship was in some manner related to the Union's prior lack of activity, where, as here, it was followed by a substantial increase in union activity. Ex-Business Manager Tucker's statements to Dougall that the International trustee had brought in a considerable number of organizers and his request that he be allowed to set up a union table to try to solicit new members also could lead Dougall to believe there was a connection between the trusteeship and a lack of union membership.

A number of employees asked Dougall and other supervisors what would happen if the Union got in and whether they had to join the Union. There is no evidence that the number of those employees was substantial with relation to the overall employee complement in the unit, and even if those remarks could be considered as evidence of dissatisfaction by employees with the Union, Respondent could not base a reasonable doubt of majority on such a limited number of questions. Cf. *Strange and Lindsey Beverages, Inc.*, 219 NLRB No. 190. However, the remarks of the employees could reasonably lead Respondent to believe that some of the employees didn't even know that there was a contract with the Union.

On August 22, 1974, Dougall read two articles in local newspapers in which remarks were attributed to International Trustee Bramlet. In one Bramlet was reported to have said that less than 20 percent in the Reno-Tahoe area were unionized, and in the other Bramlet was quoted as saying that the Union currently represented about 1,800 of the some 10,000 eligible workers in northern Nevada. Dougall's inspections of

the LM-2 forms led him to believe that between 1,000 and 1,800 employees were dues-paying members. He also ascertained that the Union had contracts with about 22 employers covering about 4,700 employees. While all this information related to industry conditions in the area as opposed to the status of Respondent's own employees, they did give Respondent some reason to question the Union's strength.

A showing of lack of employee membership in or financial support of a union is not the equivalent of establishing a lack of desire of those employees for union representation. Employees may desire representation without wanting to join a union or pay dues. *Orion Corp.*, 210 NLRB 633, enf. 515 F.2d 81 (C.A. 7, 1975). However, such matters must be considered as part of the total picture in determining whether an employer reasonably doubts a union's majority status. *Peoples Gas System, Inc.*, 214 NLRB No. 141; *Convair Division of General Dynamics Corp.*, 169 NLRB 131.

Respondent ascertained that there was about a 300 percent turnover in the employee complement per year and that there were only about 85 to 95 employees employed in 1971 who were still employed in late 1974. There were about 630 employees in the bargaining unit. High employee turnover is insufficient to establish a reasonable doubt as to a union's majority, and the Board has repeatedly held that new employees will be presumed to support a union in the same ratio as those they may replace. *Strange and Lindsey, Inc., supra; King Radio Corporation*, 208 NLRB 578, enf. 510 F.2d 1154 (C.A. 10, 1975). However, high employee turnover is one circumstance among others

that must be considered. *Peoples Gas System, Inc., supra; Convair Division of General Dynamics, supra; Kentucky News, Inc.*, 165 NLRB 777.

In mid-August 1974, Dougall was told by Wood, a business agent of the Operating Engineers, that it was common knowledge that the Union did not represent over 5 percent of the employees and that the Union would not allow a vote. Wood was not an agent of the Union, but he was concerned with the situation because the Operating Engineers, who represented a different unit of Respondent's employees, could be faced with a picket line of the Union. Though Wood's remark is not probative evidence that the Union, in fact, represented less than 5 percent of the employees, it would be unrealistic for Respondent to completely ignore such an assertion.

On about August 22, 1974, Respondent's attorney reported to Dougall that an agent of the Regional Office of the Board had told him that it was common knowledge that the Union did not represent 20 percent of the employees of any employer at the Lake. Such multiple hearsay information has little probative value, but, once again, it is unrealistic to believe that Dougall would ignore it.

Based on the information that came to Respondent's attention, it filed a petition for an election with the Board.

When viewed individually, I do not believe that any of the matters stated above would form a sufficient base for reasonably doubting the Union's majority. However, they must be viewed in their totality. The relative inactivity of the Union before the trusteeship, the imposition of the trusteeship and the subsequent

major organizational drive, the questions from employees, the newspaper articles indicating a lack of membership, the figures with regard to union members on the LM-2 forms compared with the numbers of employees and contracts, the high rate of turnover, the remarks by an agent of the Regional Office of the Board and a business agent of another union regarding the Union's lack of majority status, all must be viewed in the context of a substantial disruption in the established bargaining unit and the filing of the petition for an election with the Board. In *Taft Broadcasting*, 201 NLRB 801, the Board dismissed a refusal to bargain complaint, holding:

> While it is clear, as pointed out by the Administrative Law Judge, that each of the factors relied on by the Respondent standing alone may have weaknesses as a basis for supporting a good-faith doubt of the Union's majority status, we note that the Respondent does not rely on any one reason alone, but rather on all as a whole.

In light of the above, I find that Respondent has shown that it had a sufficient objective basis to reasonably doubt the Union's continued majority status.[45] It follows, therefore, that unless Respondent is shown to have engaged in conduct tending to encourage employee disaffection from the Union, the 8(a)(5) allegation of the complaint must be dismissed.

The complaint alleges a number of violations of the Act that are separate and distinct from the withdrawal of recognition. For the reasons set forth in detail therein, I am recommending that all of those

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[45]Cf. *Peoples Gas System, Inc., supra; Taft Broadcasting, supra; Convair Division of General Dynamics Corp., supra.*

allegations be dismissed.[46] With regard to the matters raised by the complaint and litigated in this proceeding, the General Counsel has not established that Respondent engaged in conduct tending to encourage employee disaffection from the Union. There is, however, a separate Board proceeding which involved the same parties that must be considered.

On March 13, 1975, the Board issued its Decision and Order in *Sahara-Tahoe Corporation d/b/a Sahara-Tahoe Hotel*, 216 NLRB No. 184, in which it affirmed the decision of an Administrative Law Judge dated November 19, 1974. In that case two violations of the Act were found. The first related to the discharge of Audrey Hewitt. Hewitt was discharged on July 27, 1974, because on her work time she introduced Supervisor Miller to Union Business Agent Swan and told Swan that she (Hewitt) thought that Miller would be willing to go along with them. When that incident took place, Swan was having coffee at a counter being serviced by Hewitt. Previously, Hewitt had been warned about violating Respondent's no-solicitation rule. The Administrative Law Judge found:

> . . . that Hewitt was discharged because she was talking about union activity on her work time; that the discharge was not pursuant to a non-disparate, non-discriminatory application of a lawful rule prohibiting such talk; that the discharge was not justified by a need to maintain production or discipline on work time; and that by such conduct Respondent violated Section 8(a)(3) and (1) of the Act.

[46]All of those allegations except for those set forth. in paragraph XV(b) of the complaint, which relate to the refusal of Respondent to supply the Union with a list of employees' names and addresses, are discussed in detail above. The allegation concerning the list of names and addresses is discussed in the next section.

The Board held:

> We find, in agreement with the Administrative Law Judge, that Hewitt's statement to Swan was not soliciting Miller. The Respondent, as it concedes in its brief, has no rule against talking unless it is solicitation. Hewitt's discharge, therefore, cannot be justified on the basis of the Respondent's no-solicitation rule and we need not, and do not, consider whether or not Hewitt's conduct was comparable to other conduct not related to union activity which the Respondent had tolerated in the past.

The second violation was based on a finding that in early July 1974, Head Hostess Fields asked employee Eggerman if Eggerman was going to join the Union. Eggerman replied that she did not know and would have to look into it. It was held that that interrogation could not be considered a minor isolated incident because of the Hewitt discharge.

There is nothing in the complaint in the instant case which indicates that the General Counsel is relying on the matters litigated in the prior case to establish a refusal to bargain. The General Counsel did not urge such a theory during the trial of the instant case. Respondent does not appear to have been notified of such a theory and made no effort to defend against it. The two incidents on which the finding of violation were based occurred some 3 months before the alleged refusal to bargain.[47] As is set forth above, the General

[47]The complaint alleges that Respondent withdrew recognition from the Union and refused to bargain commencing on or about October 29, 1974.

Counsel has not established that Respondent violated the Act during the intervening period.

In *Taft Broadcasting*, 201 NLRB 801, the Board dismissed a complaint that alleged that an employer violated Section 8(a)(5) of the Act. The Board held that a single unremedied, unfair labor practice did not preclude that employer from defending on the ground that it had a reasonably based doubt as to the union's majority status. The Board noted that the prior finding of violation required an order that was extremely narrow in scope and that the violation "would not be apt to have detrimental or lasting effects upon employees in the unit." In that case 28 months had elapsed between the employer's unfair labor practice and the withdrawal of recognition, and many months of good-faith bargaining took place during that period.

In *Guerdon Industries, Inc., Armor Mobile Homes Division*, 218 NLRB No. 69, the Board found that an employer violated Section 8(a)(5) of the Act by withdrawing recognition from a union when it had previously engaged in unfair labor practices which "necessarily tended to undermine the Union's authority among the employees, whose interest it was obligated to represent in such matters, with erosion of majority status the probable result." The Board relied on the fact that the preceding violations were "flagrant and egregious" in themselves and directly affected a large segment of the bargaining unit.

In the instant case, the complaint does not indicate that the matters litigated in the prior case were being relied on, the General Counsel did not advance such a theory during the trial of the case, Respondent did not have notice that it would be required to respond

to such a theory, the prior violations were not "flagrant and egregious" and did not directly affect a large segment of the bargaining unit, and 3 months elapsed between those violations and the alleged refusal to bargain.[48]

Under the circumstances set forth above, I do not believe that the violations found in the prior proceedings preclude Respondent from successfully defending against the refusal to bargain allegation of the instant complaint on the ground that it had a reasonably based doubt of the Union's continued majority status. I find that Respondent has established that defense by a preponderance of the credible evidence and I therefore recommend that paragraph XIV of the complaint be dismissed.

F. *The List of Employee Names and Address—Facts and Conclusions*

Facts

In mid-October 1974, International Trustee Bramlet and other union officials met with Union Attorney Bowe. Bowe suggested that the Union should have a list of the names and addresses of employees in order to conduct the affairs of the Union. Bramlet in-

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[48]It is noted that Respondent's petition for election was filed on September 27, 1974, and was not dismissed until June 20, 1975, even though the Administrative Law Judge's Decision in the prior case issued on November 19, 1974, and the Board's Decision issued on March 13, 1975. The dismissal of the petition was not based on the finding of violation in the prior unfair labor practice case. The dismissal letter read in part:

> The undersigned . . . issued complaint on May 30, 1975, alleging, inter alia, that the Employer has violated section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. Accordingly, it is concluded that no question concerning representation exists and the petition is therefore dismissed.

structed Bowe to send a letter to all the contractual parties requesting such a list. In the first part of November 1974, the Union requested such a list from Respondent and, as Respondent admits in its answer: ". . . on or about November 11, 1974, Respondent refused to supply the Union with a list of the names and addresses of its employees in its bar and culinary operations." On November 19, 1974, Bowe wrote to Respondent's Attorney Oliver, stating: "As promised, the purpose of this letter is to confirm that at our November 11, 1974 meeting at the Sahara Tahoe you informed me that your client would not give Hotel-Motel-Restaurant Employees and Bartenders Union Local No. 86 a list of the names, addresses or phone numbers of employees in the Local 86 bargaining units." On December 2, 1974, Oliver wrote to Bowe: "Please also be advised that based upon the employer's good faith doubt that Local 86 represents the majority of its food and beverage employees, the employer declines to furnish Local 86 with a list of the names, addresses or phone numbers of its food and beverage employees."

Union Business Representative Lawrence testified that the list was needed to properly administer the contract. However, as of November 11, 1974, when Respondent refused to furnish the list, the contract had only 19 more days to run, and there was no evidence offered to establish that the list was needed by the Union to process any pending grievances or to help the Union with regard to any specific matters relating to the contract during those 19 days. There is no indication that prior to November 1974 the Union ever requested a list of employees' names and addresses from Respondent. At the time Respondent refused the Union's request, Respondent had already

filed a petition for an election, questioned the Union's majority status and refused to bargain about a new contract. Respondent notified the Union that the failure was based on Respondent's good-faith doubt that the Union represented a majority of the employees. As found above, Respondent did have a reasonably based doubt as to the Union's majority.

In *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432 (1967) the United States Supreme Court stated: "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." The Board has repeatedly held that an employer violates Section 8(a)(5) of the Act if it fails to satisfy a union's request for information when it has established that the information is relevant to the union's performance of its role as bargaining representative. See *Magma Copper Company, San Manuel Division*, 208 NLRB 329, and cases cited therein. In the *Magma Copper Company* case, the Board held that the determination as to whether an employer is required to supply a list of names and addresses of unit employees is based on considerations such as the size of the unit, the rate of turnover, the nature of the union-security clause, if any, the union's ability to reach member and nonmember employees, and the availability of the information to the employer. However, those criteria have little meaning in the particular situation present here. The information was refused only 19 days before the expiration of the contract. There was no showing of the Union's need for such information to administer the contract during those 19 days. At the time of the refusal, Respondent had a reasonably based doubt as to the

Union's majority status and had therefore refused to enter negotiations for a new contract. Therefore, the Union had no need for the information for the negotiation of a new agreement. Under these circumstances, the conclusion is warranted that the General Counsel failed to establish by a preponderance of the credible evidence that the list of names and addresses was necessary for the Union to fulfill its collective-bargaining representative functions as alleged in paragraph XV(b) of the complaint. I shall therefore recommend that that section of the complaint be dismissed.

G. *The Arbitrability of the Dispute*

Respondent in its answer, timely raised the assertion that this case should be deferred to the arbitration procedure contained in the contract in accordance with the policy set forth in *Collyer Insulated Wire,* 192 NLRB 837. In its brief Respondent specifically requested deferral with regard to the layoff of Smith, the dispute concerning the access provision of the contract and all alleged unilateral changes in conditions of employment or benefits. Respondent stated on the record that even though the contract is now expired, it agrees to arbitrate.

The *Collyer* doctrine requires that certain types of disputes be resolved by contractual arbitration procedures rather than Board litigation. However, underpinning the entire *Collyer* approach is the assumption that the parties have a mature, workable collective-bargaining relationship. In the instant case, the parties have no contract and indeed no collective-bargaining relationship of any kind. It would not in any sense encourage collective bargaining to require deferral to arbitration in such circumstances. In Board Member

Brown's concurring opinion in the *Collyer* case, he stated:

> One other area in which I would not defer to arbitration is where there has been a repudiation of the collective-bargaining process. In such a situation the desirability of encouraging resort to arbitration must yield to the Board's duty to protect the bargaining process.

In *AMF Incorporated-Union Machinery Division,* 219 NLRB No. 109, the Board refused to defer to arbitration and adopted the Administrative Law Judge's Decision which described the situation as follows:

> . . . the questions presented by the complaint relate to a complete breakdown in contract renewal negotiations, rather than a routine contract violation arising in the course of a bargaining relationship stabilized by an existing collective-bargaining agreement of fixed duration.

One of the central issues in this case is whether the complete breakdown in the collective-bargaining relationship between Respondent and the Union was caused by Respondent's unfair labor practices. Whether that question is answered in the affirmative or in negative, the issue is one that is appropriately resolved by Board process rather than arbitration. All of the allegations in the complaint must be considered in making that determination and therefore none can be severed for resolution by arbitration.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[49]

ORDER

The complaint is dismissed in its entirety.

Dated: January 21, 1976

/s/ Richard D. Taplitz
Richard D. Taplitz
Administrative Law Judge

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[49]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

No. 78-1465

Supreme Court, U.S.
FILED
MAY 14 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

SAHARA-TAHOE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statute involved 2

Statement 3

Argument 7

Conclusion 11

CITATIONS

Cases:

Brooks v. *NLRB*, 348 U.S. 96 10

Burns International Security Services, Inc. v. *NLRB*, 567 F. 2d 945, rev'd, 225 N.L.R.B. 271 10

NLRB v. *Richard W. Kaase Co.*, 346 F. 2d 24 7

NLRB v. *Sheridan Creations, Inc.*, 357 F. 2d 245, cert. denied, 385 U.S. 1005 8

Struksnes Construction Co., 165 N.L.R.B. 1062 10

Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget, 227 N.L.R.B. 357, enforced, 584 F. 2d 293, petition for cert. pending, No. 78-1379 ..... 4, 6, 7, 8, 9, 10

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 9

Page

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 3, 4

Section 8(a)(5), 29 U.S.C. 158(a)(5) 2, 3, 4

Section 10(b), 29 U.S.C. 160(b) 2, 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6-15) is reported at 581 F. 2d 767. The decision and order of the Board (Pet. App. 16-100) are reported at 229 N.L.R.B. 1094.

JURISDICTION

The decision of the court of appeals was handed down on September 8, 1978. A timely petition for rehearing was denied on November 27, 1978 (Pet. App. 5). The judgment of the court of appeals was then entered on December 5, 1978 (Pet. App. 1). On February 16, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 23, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that petitioner violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the union without having a reasonably based good-faith doubt of the union's continued majority support among its employees.

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer–
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), provides in part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *.

STATEMENT

1. Petitioner operates a hotel, bar, restaurant and gambling casino in Stateline, Nevada (Pet. App. 30-31). In 1965 petitioner became a member of the Reno Employers Council (the "Association"), an association of employers engaged in casino and related businesses. The Association represents its members in collective bargaining with various unions, including Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (the "Union") (Pet. App. 31-32). When petitioner joined the Association, it became a party to the existing 1962-1965 collective-bargaining agreement between the Union and the Association. In doing so, petitioner recognized the Union as the representative of its bar and culinary employees (Pet. App. 67-68). When the 1962-1965 bargaining agreement expired, petitioner continued its membership in the Association and thus remained a party to successive Union-Association contracts through 1974 (Pet. App. 18, 68).

On August 2, 1974, however, petitioner announced its timely withdrawal from membership in the Association and notified the Union that it would bargain with it on an individual basis for a future contract (Pet. App. 18, 78). Two months later, however, petitioner refused the Union's request to bargain on an individual basis, claiming that it doubted that the Union represented a majority of its bar and culinary employees (Pet. App. 78-79).

2. Unfair labor practice charges were then filed by the Union. The Board concluded that petitioner had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain

with the Union without having a reasonably based good-faith doubt of the Union's continued majority support among its employees (Pet. App. 17, 24).[1]

Relying on its decision in *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 N.L.R.B. 357 (1976), enforced, 584 F. 2d 293 (9th Cir. 1978), petition for cert. pending, No. 78-1379, the Board held that petitioner's voluntary recognition of the Union established a presumption that the Union possessed the majority support of petitioner's employees and that this presumption survived petitioner's withdrawal from the multi-employer bargining unit (Pet. App. 18 n.9). In light of this presumption, the Board concluded that petitioner was not entitled to withdraw recognition from the Union unless it could establish that the Union in fact no longer represented a majority of the employees or that petitioner "had a reasonable doubt as to the Union's continuing majority status" (Pet. App. 17-18). The Board determined that the evidence relied on by petitioner to establish a reasonable doubt of majority status was insufficient "because of the speculative and subjective nature of the information on which [petitioner] based its calculations of union strength and because the circumstances, standing alone or in their totality, in no way reflect or even purport to

[1]The Board also found that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to make available to the Union, upon request, a list of employee names and addresses needed by the Union for the proper performance of its representative duties (Pet. App. 24).

reflect the sentiments of a majority of [petitioner's] employees on the question of union representation" (Pet. App. 19).[2]

[2]In asserting its doubt as to the Union's continuing majority support, petitioner relied on the following evidence: the relative inactivity of the Union prior to June 1974; inquiries from a small number of employees indicating that they did not know they were already represented by the Union; a high employee turnover rate; newspaper articles indicating low Union membership in the Tahoe-Reno area generally; and casual remarks made by a representative of another union and a Board agent to the effect that the Union represented only 5% or 20% of the employees in the Tahoe-Reno area generally.

The Board concluded that, even considering the cumulative weight of this evidence, it was inadequate to establish a reasonably-based doubt of continuing majority status. Concerning the Union's relative inactivity prior to June 1974, the Board found that there was not "a single instance where the Union failed to represent an employee properly or where an employee expressed dissatisfaction because the Union failed to represent him" and that inactivity may thus indicate no more than a harmonious work situation (Pet. App. 19-20). As to the employee inquiries, the Board found that "only a small percentage of * * * employees spoke to [petitioner] about the Union" and that their inquiries "at most, show that [they] did not know that the Union already represented [them] and * * * not * * * that they did not want the Union to represent them" (Pet. App. 21). With respect to the high rate of employee turnover, the Board noted that, under established precedent, if there is no "independent evidence from which it may be inferred that * * * new employees [do] not want the Union to represent them, * * * new employees are presumed to support a union in the same ratio as those * * * they replaced" (Pet. App. 21). The Board rejected petitioner's reliance on the newspaper reports because "they dealt with industry conditions in the Tahoe-Reno are a generally rather than with the situation in the *unit* of [petitioner's] employees" and because "the articles dealt with union *membership* rather than union *support*" (Pet. App. 22; emphasis in original). Finally, the Board found the remarks of a Board agent and a representative of another union unpersuasive because, "[l]ike the newspaper reports, these two individuals described industry conditions in the Tahoe-Reno area" (Pet. App.

3. The court of appeals upheld the Board's decision and enforced its order. Relying on its prior decision in *Tahoe Nugget, supra,* 584 F. 2d at 303, the court held that the presumption that the Union represents the majority of the employees is based on petitioner's voluntary recognition of the Union. The court found it unnecessary to determine whether petitioner's initial voluntary recognition of the Union in 1965 was unlawful because it allegedly had been entered into before petitioner hired any employees; the court noted that petitioner "was a party to a series of successive agreements all of which granted voluntary recognition to the Union *after* the Hotel had hired food and beverage employees" (Pet. App. 11; emphasis in original). The court then concluded that there is substantial evidence to support the Board's finding that petitioner had failed to establish a good faith, reasonable doubt as to the Union's continuing majority status (Pet. App. 13-15).[3]

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23). The Board pointed out that neither person "had any personal knowledge of the Union's support among [petitioner's] employees" and that their "offhand opinions based on multiple hearsay have little or no probative value" (Pet. App. 23). The Board concluded that the entire "web of circumstances" relied upon by the petitioner for its doubt of majority support "contains not a single thread of evidence that reflects * * * the sentiments of the employees themselves * * * on the question of union representation" (Pet. App. 23).

[3]The court agreed that the evidence did not indicate any employee sentiment against continued representation by the Union (Pet. App. 15). The court stated that, "while some of the evidence points to a decline in Union support within the bargaining unit," it "is ambiguous at best" and the "cumulative weight of all the evidence is not enough to rebut the presumption" (*ibid.*).

ARGUMENT

1. This case presents essentially the same legal question and factual circumstances that are presented in *Tahoe Nugget, Inc.* v. *National Labor Relations Board*, No. 78-1379, pending on petition for a writ of certiorari. Here, as in *Tahoe Nugget,* petitioner urges that the Board and the court of appeals improperly relied on petitioner's voluntary recognition of the Union to establish a presumption of continuing majority support (Pet. 15-16). Moreover, here as in *Tahoe Nugget,* petitioner claims that its initial voluntary recognition of the Union was unlawful and thus cannot support a presumption of continued majority status (Pet. 14-15). For the reasons stated in our Brief in Opposition to Petition in *Tahoe Nugget* at 7-11, petitioner's contentions are unavailing.[4]

a. The presumption of continuing majority status is based on the employer's voluntary recognition of the Union and not simply on membership in a multi-employer bargaining unit. Brief in Opposition to Petition in *Tahoe Nugget* at 7-8. There is thus no conflict between the decision in this case and the decision of the Sixth Circuit in *NLRB* v. *Richard W. Kaase Co.*, 346 F. 2d 24 (1965), as petitioner contends (Pet. 15-18). In *Kaase* the employer had not voluntarily recognized the Union; instead recognition was based on an election in a multi-employer unit where, although the Union received a majority of the votes in

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[4]We are sending petitioner a copy of our brief in opposition to the petition in *Tahoe Nugget.*

the entire unit, it could not be said that the Union received majority support from the employees of any individual employer.[5]

b. Petitioner's claim (Pet. 11, 14-15) that the presumption of majority status cannot be based on the initial voluntary recognition of the Union because that recognition was unlawful does not differ in substance from the similar claim in *Tahoe Nugget*.[6] For the reasons discussed in our Brief in Opposition in *Tahoe Nugget* at 8-11, any reliance by petitioner on its

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[5]Petitioner's reliance (Pet. 16) on *NLRB* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967), is also unwarranted. In that case, the court of appeals agreed with the Board that an employer member of a multi-employer bargaining group cannot lawfully refuse to bargain on the basis of a doubt as to the union's majority status among its own employees when the employer has not timely withdrawn from the multi-employer unit and that unit is still the appropriate unit for bargaining. 357 F. 2d at 248. As the Board pointed out in *Tahoe Nugget, supra*, 227 N.L.R.B. at 357 n.6, *Sheridan Creations was*

> grounded on the principle that the multi-employer unit, once established, remains the appropriate unit for all the employees and employers until lawfully disestablished or modified. These cases, therefore, say nothing about the presumption of majority status existing originally among the employees of each employer. Once an employer lawfully withdraws from the unit, of course, it is free to justify a withdrawal of recognition by successfuly rebutting the presumption.

[6]In *Tahoe Nugget*, the petitioner claimed that its initial recognition of the Union was unlawful because the Union lacked majority support at the time of recognition. Here, petitioner claims that its initial voluntary recognition was unlawful because it had no employees at that time as to whom majority support could be determined.

allegedly unlawful conduct in 1965 is time-barred by the six-months limitations period in Section 10(b) of the Act.[7]

2. Petitioner's additional contentions (Pet. 20-28) challenge only the agency's application of the facts of this case to determine that petitioner lacked a reasonably based, good-faith doubt of the Union's continuing majority status. Further review of these factual issues is unwarranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). There is ample evidence to support the Board's findings in this case. See note 2, *supra*.

a. Despite petitioner's claim (Pet. 22-23), it is evident that neither the court of appeals nor the Board failed to consider "the totality of the evidence." Both the Board (Pet. App. 23-24) and the court (Pet. App. 13-15) considered the record as a whole and concluded that petitioner's evidence, "standing alone or in its totality" (Pet. App. 24), failed to establish reasonable doubt of continued majority support for the Union.

b. Petitioner errs in assuming that the decision of the court of appeals requires "direct interrogation by an employer of his employees to determine actual union support * * * [in order to] rebut the presumption of majority status" (Pet. 21). The court did not reject petitioner's evidence of non-support because it was derived from sources other than employees. Rather, as the court noted (Pet. App. 14-15), the

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[7]As a result, any reliance by the court of appeals (see Pet. App. 11-12) on successive voluntary recognitions of the Union during the course of petitioner's membership in the Association was unnecessary. It was sufficient to hold, as the same court held in *Tahoe Nugget, supra*, 584 F. 2d at 304, that the claimed illegality of the initial recognition was time-barred.

statements relied on by petitioner were "offhand" and referred to "union membership in a general area and said nothing of an actual lack of union support at the Hotel." The court also observed that the few remarks by petitioner's employees that suggested a lack of Union support "came from only a small percentage of employees out of a work unit of 525 to 750 employees" (Pet. App. 14).[8]

c. Petitioner's concern that the rulings below will "thwart[] employee freedom of choice and majority rule" (Pet. 21) is misplaced. As the court of appeals recognized in *Tahoe Nugget, supra,* 584 F. 2d at 301 (footnote omitted), "[i]n refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious champion of its employees, a role no one has asked it to assume." " 'The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.' " 584 F. 2d at 301 n.30, quoting *Brooks* v. *NLRB,* 348 U.S. 96, 103 (1954).

[8]Petitioner is also mistaken in its view (Pet. 21) that interrogation by the employer as to the employees' union support would be "unlawful" (Pet. 21). Such polling is lawful if it meets criteria designed to assuage employee fears of reprisal. *Struksnes Construction Co.,* 165 N.L.R.B. 1062 (1967). In *Burns International Security Services, Inc.* v. *NLRB,* 567 F. 2d 945 (10th Cir. 1977), on which petitioner relies (Pet. 22, 25-26), the court merely reversed the Board's finding that the poll there did not meet the *Struksnes* standards. 225 N.L.R.B. 271, 274 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1979

DOJ-1979-05

opposition

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement of the case	3
Argument	3
I	
The board and court applied the only controlling standard in finding that the presumption of majority status applies in this case	3
A. Voluntary recognition of the Union is the proper factual predicate for application of the presumption	4
B. Application of the presumption does not deny freedom of choice to employees	8
II	
The Court of Appeal and board properly assessed the cumulative impact of factors claimed to support petitioner's reasonable doubt	9
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases

	Page
Brooks v. N.L.R.B., 348 U.S. 96 (1954)	9
Celanese Corporation of America, 95 N.L.R.B. 664 (1954)	4, 5
International Ladies Garment Workers' Union v. N.L.R.B., 366 U.S. 731 (1961)	5
Local Lodge No. 1424, I.A.M. v. N.L.R.B., 362 U.S. 411 (1960)	7
Lodges 1746 and 743, I.A.M. v. N.L.R.B., 416 F.2d 809 (D.C. Cir., 1969) cert. denied 396 U.S. 1058 (1970)	8
N.L.R.B. v. Burns International Security Services, 406 U.S. 272 (1972)	4
N.L.R.B. v. Cayuga Crushed Stone, Inc., 474 F.2d 1380 (2d Cir., 1973)	5
N.L.R.B. v. Denham, 469 F.2d 239 (9th Cir., 1972), vacated on other grounds 411 U.S. 945 (1973)	5
N.L.R.B. v. District 30, U.M.W., 422 F.2d 115 (6th Cir., 1969) cert. denied, 398 U.S. 959 (1970)	8
N.L.R.B. v. Frick Co., 423 F.2d 1327 (3rd Cir., 1970)	4, 5
N.L.R.B. v. Richard W. Kaase Co., 346 F.2d 24 (6th Cir., 1965)	6, 7
N.L.R.B. v. Sheridan Creations, Inc., 357 F.2d 245 (2nd Cir., 1966), cert. denied 385 U.S. 1005 (1967)	7
N.L.R.B. v. Tahoe Nugget, Inc., 485 F.2d 293 (9th Cir., 1978)	4, 5, 6, 8, 9, 11
N.L.R.B. v. Vegas Vic, Inc., 546 F.2d 828 (9th Cir., 1976) cert. denied 434 U.S. 818 (1978)	8
Retired Persons Pharmacy v. N.L.R.B., 519 F.2d 486 (2nd Cir., 1975)	9
Strucksnes Construction Co., Inc. 165 N.L.R.B. 1062 (1967)	10
Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget, 227 N.L.R.B. 357 (1976)	4
Terrell Machine Co. v. N.L.R.B., 427 F.2d 1088 (4th Cir., 1970) cert. denied 398 U.S. 929 (1970)	8
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951)	11
Wausau Steel Corp. v. N.L.R.B., 377 F.2d 369 (7th Cir., 1967)	11

Statutes

28 U.S.C. § 1254(1)	2
National Labor Relations Act:	
29 U.S.C. Section 158(a)	2
Section 159(c)(1)(A)(ii)	8
Section 160(b)	2, 7

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1465

SAHARA-TAHOE CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, *and*
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 581 F.2d 767. (Pet.App. 6-15). The decision and order of the National Labor Relations Board are reported at 229 N.L.R.B. 1094. (Pet.App. 16-100).

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1978. Thereafter, on November 27, 1978, a petition for rehearing was denied. (Pet.App. 5). The time for

filing a petition for a writ of certiorari was extended by Mr. Justice Rehnquist to and including March 23, 1979. The petition was timely filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether the Board abused its discretion in holding that the presumption of majority status, derived from petitioner's voluntary recognition of the Union as the majority representative of its own employees, could not be defeated by petitioner's subsequent withdrawal from a multiemployer bargaining unit?

2. Whether the Board's finding that petitioner had not established a reasonably grounded doubt of the Union's majority status was supported by substantial evidence?

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in pertinent part:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *."

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), provides in pertinent part:

> "Whenever it is charged that any such person has engaged in or is engaged in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served on such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided,* that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

STATEMENT OF THE CASE

The Brief For The National Labor Relations Board In Opposition succinctly and accurately states the case.

ARGUMENT

I

THE BOARD AND COURT APPLIED THE ONLY CONTROLLING STANDARD IN FINDING THAT THE PRESUMPTION OF MAJORITY STATUS APPLIES IN THIS CASE.

The petition seeks to divert the Court's attention from the underlying dispute. The unfair labor practice charges which the court ultimately enforced arose directly from the petitioner's *unilateral* action of abruptly refusing to bargain with the Union, thereby disrupting a continuous, nine-year collective bargaining history.

The Board and courts have uniformly held that an employer who takes such action must overcome the presumption of the continued majority status of a union by establishing either that the union was, in fact, supported by only a minority of the employees, or that the employer had a good faith reasonable doubt of majority support for the union at the time of the refusal to bargain. This Court has recognized the validity of that presumption by its adoption

of the seminal Board decision in *Celanese Corporation of America*, 95 N.L.R.B. 664 (1954).[1]

Petitioner presents the Court with several explanations for its inability to rebut the presumption of continued majority status of the Union. Petitioner's main argument is that the presumption is inapplicable because petitioner voluntarily recognized the Union in 1965; and as a corollary, the presumption could not survive petitioner's withdrawal from the multiemployer bargaining unit in 1974. Petitioner also argues that application of the presumption in this case somehow denies employees their freedom of choice. Finally, it argues that it was impossible to meet its burden of proof. None of these arguments raise any issue warranting review by this Court.

A. Voluntary recognition of the Union is the proper factual predicate for application of the presumption

Consistent with established judicial authority, the Board held in this case that petitioner's voluntary recognition of the Union as the bargaining representative of its bar and culinary employees gave rise to a continuing presumption of the Union's majority status among those employees. (Pet.App. 18 n.9).[2] Cf. *N.L.R.B. v. Frick Co.*, 423 F.2d 1327, 1330-1331 (3rd Cir., 1970); *N.L.R.B v Cayuga Crushed Stone, Inc*, 474 F.2d 1380, 1383 (2d Cir., 1973); *N.L.R.B. v. Denham*, 469 F.2d 239, 244 (9th Cir., 1972), vacated on other grounds 411 U.S. 945 (1973). As this Court has stated, voluntary recognition without a Union majority would violate the Act. *International Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). Once established, the presumption of continued majority status continues throughout the term of the collective bargaining agreement and beyond. *Celanese Corporation of America, supra*, at 672.

[1] See, *NLRB v. Burns International Security Services*, 406 U.S. 272, 279 n.3 (1972), in which the *Celanese* decision was cited with approval.

[2] The Board relied upon its decision in *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 N.L.R.B. 357 (1976). Similarly, in enforcement proceedings, the Court relied on its reasoning in *N.L.R.B. v. Tahoe Nugget, Inc.*, 485 F.2d 293 (9th Cir., 1978), involving the issue of voluntary recognition, and withdrawal from the multiemployer bargaining unit. A petition for writ of certiorari has also been filed in that case. (No. 78-1379).

The Board and court of appeals decisions clarify that it was the petitioner's own action of voluntarily recognizing the Union as the majority representative of its employees in 1965 which gave rise to the presumption of continued majority status. (Pet.App. 9, 18 n.9). Thus, the lower decisions were in conformity with the established judicial authority and review is not warranted.

Based upon this predicate, the court of appeals, relying upon its decision in *N.L.R.B. v. Tahoe Nugget, supra*, upheld the Board's application of the presumption following petitioner's withdrawal from the multiemployer unit:

> "When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violate the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even

though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion of the original unit, a unit previously determined from the employer's own conduct to favor union representation."

[Pet.App. 12-13]

Thus, petitioner's assertion that the factual predicate for the presumption is absent in this case is without foundation. (Pet. 14-15). It was petitioner's voluntary recognition of the Union in 1965 as the majority representative of its employees which gave rise to the presumption. When the petitioner withdrew from the multiemployer association in 1974, it reverted to that unit.[3]

Cases relied upon by petitioner to establish conflict only serve to underscore the error in its approach. For example, in *N.L.R.B. v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir., 1965) (Pet. 15-18), the recognition of the union was based upon election of employees within a multiemployer

[3]Petitioner's contention that its initial recognition of the Union was somehow distinguishable from the situation in *Tahoe Nugget, supra*, is factually unsupportable. (Pet.15). Petitioner contends that at the time it joined the multiemployer bargaining unit, it had no bar and culinary employees to "declare" favored the Union. However, it is clear that in the present case it was not the act of joining the multiemployer bargaining unit which bound petitioner to the agreement. The voluntary recognition of the Union occurred sometime later, after the petitioner had hired bar and culinary employees. Petitioner joined the multiemployer bargaining unit in April, 1965. After that time the Union was informed that petitioner would become party to the agreement *after it employed bartenders and culinary workers* (Pet. App. 67-68). Thereafter, when petitioner in fact employed bar and culinary employees it became bound by the agreement. It was through that act that petitioner voluntarily recognized the Union, and through which the presumption arose. Petitioner's claim that it had no employees to "declare" at the time it recognized the Union is a simple misstatement of fact.

unit rather than by voluntary recognition, as here. In the *Kaase* situation, the union must receive a majority of votes of the participating employees of *all* employers in the unit to obtain representative status. Thus, the union may become majority representative even though it did not receive a majority of the employees of *each* individual employer member of the multiemployer unit. In the present case, the presumption was not derived from union majority in the multiemployer unit, but rather from the petitioner's act of voluntarily recognizing the Union in 1965 as the majority representative of its employees. Petitioner's reliance on *Kaase* is unavailing, and asserted conflicts in the circuits is imaginary.[4]

The Board and court of appeals correctly held that petitioner could not avoid application of the presumption by now claiming that the initial recognition of the Union more than nine years earlier had been unlawful. Because petitioner's recognition of a minority union would have been an unfair labor practice occurring beyond the six-month limitation period in Section 10(b) of the Act, both the Board and the court of appeals concluded petitioner could not revive a legally defunct unfair labor practice in order to defend against a present refusal to bargain. *Local Lodge No. 1424, I.A.M. v. N.L.R.B.*, 362 U.S. 411, 416 (1960):

[4]Petitioner also relies on *N.L.R.B. v. Sheridan Creations, Inc.*, 357 F.2d 245 (2nd Cir., 1966), cert. denied 385 U.S. 1005 (1967) (Pet. 16). In that case, it was held that an employer member of a multiemployer unit could not refuse to bargain with the union as the basis of a doubt of union majority status among its own employees. Moreover, the employer had not withdrawn from the multiemployer unit. Hence, the question of the status of the presumption upon withdrawal from or dissolution of a multiemployer unit was not presented and the case is inapposite.

N.L.R.B. v. District 30, U.M.W., 422 F.2d 115, 122 (6th Cir., 1969) *cert. denied,* 398 U.S. 959 (1970).[5]

B. Application of the presumption does not deny freedom of choice to employees

Petitioner's argument that the application of the presumption somehow denied employees of their freedom of choice was duly considered and rejected by the Board and court of appeals. The court again relying on its decision in *N.L.R.B. v. Tahoe Nugget, Inc., supra,*[6] correctly recognized that employees have a direct statutory procedure available to them in order to choose whether or not they desire Union representation. The decisions below do not compromise that freedom of choice. In noting that *employees* were free to petition for an election without interference from the petitioner, the court recognized that a decertification petition filed by the employees pursuant to Section 9(c)(1)(A)(ii) of the Act is a true expression of employee dissatisfaction. In the absence of such a petition, the court was properly

[5]Petitioner also implies that the circumstances of the initial recognition should be admitted to bolster petitioner's claim of good faith in refusing to bargain in 1974. (Pet. 23). Even if petitioner's late-confessed unlawful recognition was admitted to show its good faith in suddenly deciding to accord their employees a free choice of bargaining representation in 1974, the court of appeals correctly concluded that mere subjective belief was not a sufficient ground to disrupt the stability of the bargaining relationship. Consistent with other courts of appeals, and in reliance on its decision in *N.L.R.B. v. Tahoe Nugget, Inc., supra,* the court held that petitioner's claimed reasonable doubt could only be sustained by objective facts showing a majority of their employees no longer desired Union representation. *Terrell Machine Co. v. N.L.R.B.,* 427 F.2d 1088, 1090 (4th Cir., 1970) *cert. denied* 398 U.S. 929 (1970); *Lodges 1746 and 743, I.A.M. v. N.L.R.B.,* 416 F.2d 809 (D.C.Cir., 1969) *cert. denied* 396 U.S. 1058 (1970); *N.L.R.B. v. Vegas Vic, Inc.,* 546 F.2d 828, 829 (9th Cir., 1976) *cert. denied* 434 U.S. 818 (1978).

[6]*N.L.R.B. v. Tahoe Nugget, Inc., supra* at 301.

skeptical of the petitioner's attempt to portray itself as the champion of employee freedom of choice. Such recognition is in accordance with the directive of this Court, as well as other circuits. *Brooks v. N.L.R.B.,* 348 U.S. 96, 103 (1954); *Retired Persons Pharmacy v. N.L.R.B.* 519 F.2d 486, 490 (2nd Cir., 1975). Thus, petitioner's characterization of this dispute as one involving employee freedom of choice (Pet. 8, 12, 21-22), is misleading; although an election was available to employees, they never chose to initiate such a procedure.

The Board and court also recognized that policy considerations militate in favor of the presumption in this case. The presumption facilitates attainment of the Act's underlying purpose: industrial peace. Conversely, permitting the petitioner to refuse to bargain with the Union after a nine-year bargaining relationship, in pursuit of asserted but unexercised employee rights is antithetical to that goal. *Brooks v. N.L.R.B., supra* at 103. *N.L.R.B. v. Tahoe Nugget, Inc., supra* at 301-302.

II

THE COURT OF APPEAL AND BOARD PROPERLY ASSESSED THE CUMULATIVE IMPACT OF FACTORS CLAIMED TO SUPPORT PETITIONER'S REASONABLE DOUBT.

Petitioner's final contention is that the Board and court have created an irrebuttable presumption. (Pet. 20-28). This contention has no merit. Petitioner has confused the concept of "irrebuttable presumption" with its own failure to produce sufficient evidence to rebut the presumption.

The record is replete with patient consideration of the petitioner's evidence by both the Board and the court.[7] Although the petitioner was given every opportunity to present its evidence, the Board found the evidence "speculative and subjective". (Pet. App. 19). The court of appeals found the evidence "ambiguous at best." (Pet. App. 15). These statements manifest the fact that the decisions below were not the product of an irrebuttable presumption, but rather, of the petitioner's failure to produce evidence sufficient to rebut the presumption. No case or authority cited by petitioner permits it to meet its burden of proof by producing speculative or conjectural evidence. Its assertion of conflicting decisions is thus unavailing.[8]

Petitioner's argument that the Board and court "ignored the totality of the evidence relied upon by the Hotel" is likewise unsupportable. (Pet. 24). The court clearly considered the totality of the evidence and found that:

> ". . . the cumulative weight of all of the evidence is not enough to rebut the presumption. It is ambiguous at best and we see no reason to disturb the Board's finding that the web [of circumstances] contains not a single thread of evidence that the employees themselves had told [the Hotel] that they no longer wanted the Union to represent them. Indeed, the web contains not a single thread of evidence that reflects or even purports to reflect the sentiments of the employees themselves—any unit employee much less a majority of the unit employees—on the question of union representation. Absent such threads, the web of circumstances is like the Cheshire cat's grin—nothing behind it." (Pet.App. 15).[9]

[7]Petitioner also implies in its petition that it has established certain "facts". (Pet. 23-24). In fact, the evidence was found to be either irrelevant or subjective in that it did not indicate how the petitioner's employees felt about continued Union representation. Petitioner's continued reliance on those factors at this date indicate its failure to come to come to grips with the reality that the evidence presented did not rise to a level sufficient to rebut that presumption. (Pet.13).

[8]Petitioner erroneously asserts that only direct interrogation of employees will permit it to rebut the presumption. (Pet. 21). Again, petitioner essentially complains about the stringency of the standard. Similarly, petitioner's contention that employees may not be polled is erroneous. The Board permits polling under certain circumstances. *Strucksnes Construction Co., Inc.*, 165 N.L.R.B. 1062 (1967).

The Board also considered the cumulative effect of the evidence, and found it deficient even on that basis. (Pet. App. 19-24).

Petitioner's argument is thus reduced to a claim that the Board erred in the evidentiary weight accorded each of petitioner's asserted objective considerations since similar factors, *once established*, had previously been held to justify a refusal to bargain. (Pet. 21-22). In essence, this is a confession that the petitioner engaged in brinksmanship in attempting to thwart collective bargaining among its employees. As another court of appeals stated in an analogous context, ". . . one who engages in 'brinksmanship' may easily overstep and tumble into the brink." *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir., 1967). Clearly, petitioner's disagreement with the Board's findings with respect to the weight of the evidence, or factual conclusions to be drawn therefrom, does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951). Moreover, because such an evidentiary determination turns on the totality of all the circumstances, review of the Board's findings cannot have a substantial impact on other litigants.

[9]*N.L.R.B. v. Tahoe Nugget, Inc., supra*, at 305 n.46.

CONCLUSION

For all the above reasons, as well as for the reasons stated in the Brief For The National Labor Relations Board In Opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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